



Disability and Guardianship Project

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April 3, 2020

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Lund v. First Republic Trust Company (S261158)
Amicus Curiae Letter Supporting Petition for Review (Rule 8.500(g).)

To the Court:

Spectrum Institute urges this Court to grant review in the above-entitled case in order to secure uniformity of decision and to settle important questions of law. (Rule 8.500(b).)

About *Amicus Curiae*

Spectrum Institute is a nonprofit organization engaging in research, education, and advocacy activities to protect the rights of seniors and people with disabilities. For several years, the organization has focused on deficiencies in policy and practice in the probate conservatorship system. Over the course of the past year, a workgroup it has engaged in a thorough analysis of the capacity assessment policies and practices that apply to probate court proceedings. (<https://spectruminstitute.org/capacity/>) Among the areas of analysis is the assessment of litigation capacity involving the appointment of a guardian ad litem (GAL) in various types of legal proceedings. (<https://spectruminstitute.org/capacity/readings.htm>)

Interest in the GAL Appointment Process

Among other issues, the appeal in this case challenged the process by which the Los Angeles Superior Court appointed a GAL to stand in place of Bradford Lund in litigation regarding the disbursement of funds to him from a trust. The order deprived Mr. Lund of directing and participating in his own litigation, effectively reducing his status in the proceedings to that of a bystander. The GAL was given instructions to engage in settlement negotiations and to represent Mr. Lund in all future proceedings in the case. As explained below, the process by which the GAL was appointed and given instructions to direct the litigation on Mr. Lund's behalf raises serious issues of federal due process and federal statutory rights to freedom from discrimination because of a perceived disability.

Spectrum Institute is also interested in this case because the Court of Appeal denied Mr. Lund an appellate forum in state court in which to challenge his due process and

discrimination claims regarding the manner in which a GAL was appointed. If such a truncated process this can happen to one litigant, such as Mr. Lund, it can happen to anyone who a judge perceives to have a disability. On the ground that the GAL order was not appealable, the Court of Appeal dismissed the case and therefore never reached the merits of Mr. Lund's arguments. As a result of being denied an appellate forum in state court to seek redress, Mr. Lund then filed a federal lawsuit against the superior court to vindicate his federal statutory and constitutional rights. As explained more fully below, denying an appellate forum in state court when a GAL order violates due process or federal nondiscrimination statutes has the effect of driving litigants to federal court to seek relief. That is not a good policy for the State of California to adopt. Neither is it fair to seniors and people with actual or perceived disabilities who find themselves on the receiving end of unconstitutional or discriminatory GAL orders of California state courts.

Denial of a State Appellate Forum

Mr. Lund had been participating in the litigation as a party, through his chosen attorneys, in this and other litigation for several years. He had been deemed competent to do so by a prior judge in the Los Angeles Superior Court. He had also previously been deemed competent to manage his own financial affairs by a judge in Arizona who, after a lengthy trial, had denied a petition for a conservatorship there. His attorneys in the current case in Los Angeles believed, and continue to believe, that Mr. Lund has the mental capacity to personally participate in the current litigation.

Despite all of this being brought to the attention of a new judge in this trust litigation, on September 27, 2019, an order was entered substituting a GAL in place of Mr. Lund and his attorneys for the purposes described above. This order was entered on the basis of erroneous perceptions by the judge that Mr. Lund may have Down syndrome and an implied conclusion that, because of this perceived disability, Mr. Lund lacked the capacity to personally participate in this litigation with the assistance of his chosen attorneys. This order was entered without affording Mr. Lund an evidentiary hearing to confront and cross-examine witnesses, to challenge hearsay on which the court relied, and to present evidence of his litigation capacity. In other words, the order was entered on the basis of the judge's disability prejudice which was grounded in a perception which arose from hearsay rather than substantial admissible evidence.

Mr. Lund appealed from all aspects of the order, including the part authorizing, instructing, and directing the GAL. (<https://spectruminstitute.org/notice-of-appeal.pdf>) Before Mr. Lund was able to file an opening brief in the Court of Appeal, respondent trustees filed a motion to dismiss. They argued that no part of the September 27 order was appealable. Mr. Lund opposed the motion to dismiss.

On February 19, 2020, the Court of Appeal dismissed the appeal, thereby depriving Mr. Lund of the right to have that court decide whether the abbreviated process used by the trial court to appoint the GAL violated his right to due process under the federal constitution. It

also deprived him of having the appellate court decide whether appointing a GAL on the basis of a perceived disability, rather than on admissible evidence adduced during an evidentiary hearing, constituted discrimination on the basis of disability in violation of Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, or California Government Code Section 11135.

Resort to a Federal Judicial Forum

Having been denied an appellate forum in the California courts to seek redress for his grievances against the Los Angeles Superior Court, on February 27, 2020, Mr. Lund filed a complaint in federal court. It alleged that the Los Angeles Superior Court had violated M. Lund's right to due process under the federal constitution in violation of federal law. (42 U.S.C. § 1983.) On March 17, 2020, an amended complaint was filed adding an allegation that the conduct of the superior court also violated Title II of the Americans with Disabilities Act. (<https://spectruminstitute.org/amended-federal-complaint.pdf>)

Impact on a Larger Class of Litigants

While the truncated process used by the superior court to replace Mr. Lund with a GAL in these ongoing trust proceedings directly affects only one litigant, the rights of thousands of seniors and other litigants with actual or perceived disabilities are placed at risk – not only in Los Angeles County but throughout California. Even though the Court of Appeal opinion was not certified for publication, judges and attorneys throughout the state would have access to the opinion when doing legal research through online databases such as casetext.

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. (<https://spectruminstitute.org/2017-18-probate-filings.pdf>) 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.” (“Guardian ad Litem Mandatory Training” - Feb. 6, 2018) (<https://spectruminstitute.org/lacba-program.pdf>) The increasing frequency of the use of GALs emphasizes the need for clarity in the process required for assessing the capacity of litigants to process their own cases with assistance of counsel of their choice, as well as clarity on the appealability of orders authorizing and instructing a GAL.

Replacing a litigant with a GAL infringes on the constitutional right of a litigant to manage his 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.)

In the context of a child welfare proceeding, this 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. 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 should also be true for litigation involving financial matters.

Our Class-Based Concerns

Spectrum Institute has two concerns regarding the rights of these 15,000 or so adults who become involved in probate court litigation each year in California. First and foremost is that any process used by the court to substitute a GAL in their place to conduct the litigation should comport with federal due process standards and comply with nondiscrimination mandates of state and federal laws. Second is that if a GAL is appointed and given instructions by the court, over their objections, that they should have an effective and timely appellate remedy in state court.

Narrow Issue on Review

If this Court grants review, it should address our second concern. When relevant statutes and appellate opinions are considered, there is some ambiguity as to whether an order authorizing a GAL or giving a GAL instructions is an appealable order. This Court should grant review to resolve this ambiguity. These thousands of seniors and adults with actual or perceived disabilities who are involved in probate court proceedings deserve to have clarity as to whether such an order is immediately appealable.

If this Court decides that such orders are not appealable, this class of people can seek redress in the Legislature for a legislative amendment to specify that they are. In the meantime, members of the class seeking redress of their federal statutory and constitutional rights will need to file lawsuits in federal court to challenge the illegal actions of the superior courts, just as Mr. Lund has done. They may also decide to file complaints with the United States Department of Justice against superior courts which enter GAL orders in violation of Title II of the ADA and Section 504 of the Rehabilitation Act. They may also choose to file complaints against the offending courts with the California Department of Fair Employment and Housing arguing that appointments of a GAL based on perceptions rather than admissible testimony and documents at an evidentiary hearing constitute disability discrimination in violation of Section 11135. All of these avenues for relief become unnecessary if this Court decides that such grievances can be resolved within California appellate courts in the course of an appeal from an order authorizing and instructing a GAL

to replace a litigant.

If this Court decides that such orders are appealable, then Mr. Lund's case can be remanded back to the Court of Appeal to decide the merits of his arguments. Mr. Lund would have an appellate forum to decide whether the process used by the trial court should be reversed on the ground that it violated federal due process standards and was done in violation of nondiscrimination requirements of Title II of the ADA, Section 504 of the Rehabilitation Act, and Section 11135 of the California Government Code.

The Need to Resolve Ambiguities

The motion to dismiss filed by the trustees argued that the order appointing and instructing the GAL was not an appealable order. Mr. Lund argued that Probate Code Section 1300(c) authorized an appeal from an order "authorizing, instructing, or directing a fiduciary." The trustees countered that a GAL is not a fiduciary and therefore Section 1300 did not make the trial court's GAL order appealable.

Misreading the totality of Mr. Lund's arguments, the Court of Appeal stated in its decision: "Finally, we note that the parties *appear to agree* that the order appointing the GAL is not appealable. Appellants' arguments on appealability focus on the portions of the further rulings granting in part the petition for approval. We have concluded that none of those rulings is appealable. We therefore must dismiss the appeals." (Slip Opinion, p. 10) (Emphasis added.)

Despite the court's belief that the "parties appear to agree" that the GAL order is not appealable, in fact Mr. Lund never agreed to such a proposition. His position was much more nuanced.

At one point in his response to the motion to dismiss the appeal, Mr. Lund did state that: "An individual order *appointing* a GAL is not *itself* appealable." (Response to Motion to Dismiss, p. 10) (Emphasis added.) It is true there is no statute directly and explicitly authoring an appeal from an order *appointing* a GAL. However, the order of the trial court authorizing a GAL and giving the GAL instructions is appealable pursuant to subdivision (c) of Probate Code Section 1300 – providing that a GAL is deemed to be a fiduciary.

At various places in his opposition to the motion to dismiss, Mr. Lund expressly argued that the trial court's order was appealable under Section 1300(c). (Opposition to Respondent's Motion to Dismiss, pp. 8, 19) His notice of appeal expressly relied on Section 1300(c). (<https://spectruminstitute.org/notice-of-appeal.pdf>)

Respondent argued that subdivision (c) of Section 1300 did not apply because a GAL is not a fiduciary. Mr. Lund replied: "The Respondents make the bald argument, with no authority, that a GAL is not a fiduciary under Prob. Code, § 39. However, there is no authority which

says so. Prob. Code, § 39 reads in pertinent part: “‘Fiduciary’ means personal representative, trustee, guardian, conservator, attorney-in-fact under a power of attorney, custodian under the California Uniform Transfer To Minors Act (Part 9 (commencing with Section 3900) of Division 4), or other legal representative subject to this code.” There is nothing in this definition that removes a GAL from such definition. A GAL is a legal representative of Mr. Lund and owes him a fiduciary duty.” (Opposition to Appellee’s Motion to Dismiss, p. 26.)

Thus, when the entirety of Mr. Lund’s arguments are considered, it is not fair to state that he agreed that an order authorizing and instructing the GAL is not an appealable order. He merely acknowledged the absence of statutory language authorizing an appeal from an order “appointing a GAL.” There is, however, statutory authority for an appeal from an order “authorizing, instructing, or directing a fiduciary.”

The question therefore – one not resolved by the Court of Appeal – is whether a GAL is a fiduciary. Review should be granted to decide this important question of law and to resolve conflicts on the appealability of a probate court order instructing a GAL.

Merits of the Appealability Issue

Granting review to resolve ambiguities on this important question of appealability would likely result in a reversal and remand, thus giving Mr. Lund an opportunity to argue before the Court of Appeal the merits of the alleged violations of federal due process and of federal and state nondiscrimination laws. It would also provide clarity to thousands of seniors and people with actual or perceived disabilities on the right to appeal should a trial court summarily appoint a GAL in their cases without affording them due process to contest allegations or to challenge perceptions about their litigation capacity.

An analysis of applicable statutes and appellate cases suggests this Court would rule that a GAL is a fiduciary and therefore an order authorizing and instructing a GAL in a probate court proceeding is an appealable order under Probate Code Section 1300.

Section 1300(c) states that an appeal may be taken from the making of any of an order “authorizing, instructing, or directing a fiduciary” The statute does not specifically define the term fiduciary, thus requiring reference to other statutes and various appellate cases for clarification of its meaning.

In this case, the trial court entered an order on September 27, 2019, authorizing Margaret Lodise to act as a GAL for Mr. Lund and instructing her regarding her duties as such. (“Further Rulings on . . . OSC re: Guardian Ad Litem,” p. 4.) The question on appeal is not whether the court entered an order authorizing her to act as a GAL or instructing her as to her duties. That is clear. The question is whether she is a fiduciary within the meaning of Section 1300(c).

Although the term “fiduciary” is defined in Probate Code Section 39, the definition contained therein is not dispositive of whether a GAL is a fiduciary. Section 39 states that “‘Fiduciary’ means personal representative, trustee, guardian, conservator, attorney-in-fact under a power of attorney, custodian [under another statute] or *other legal representative subject to this code.*” (Emphasis added.)

A GAL is a legal representative subject to the Probate Code. Section 1003 authorizes a court to appoint a GAL in a probate proceeding to “represent the interest” of an incapacitated person. Thus, the Probate Code itself considers a GAL to be a legal representative, namely, someone who represents the legal interests of another.

Using the doctrine of *ejusdem generis* as a tool for statutory construction, Probate Code Sections 16460 and 1204 suggest that a guardian ad litem who is appointed under the Probate Code is a fiduciary.

Section 16460 shows legislative intent that a GAL is a “legal representative.” Subdivision (b)(2) states that a beneficiary is deemed to have received an account or report . . . “In the case of an adult who is not reasonably capable of understanding the account or report, if it is received by the person’s *legal representative, including a guardian ad litem* or other person appointed for this purpose.” (Emphasis added.)

Section 1204 states: “A person, including a guardian ad litem, guardian, conservator, trustee, *or other fiduciary*, may waive notice . . .” (Emphasis added.)

In a context other than a probate proceeding, this Court has recognized that a “guardian ad litem is a fiduciary.” (*In re Josiah Z* (2005) 36 Cal.4th 664, 679.) An appellate court opinion has observed that a “guardian ad litem’s powers are thus subject to both the fiduciary duties owed to the incompetent person and the requirement that court approval be obtained for certain acts.” (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 644.)

Federal courts and other states also recognize that a guardian ad litem is fiduciary. (*Garrick v. Weaver* (10th Cir. 1989) 888 F.2d 687, 693; *In re C.D.* (Iowa App. 1993) 509 N.W.2d 509, 513.)

Despite all of these statutory authorities and judicial pronouncements, there is contrary authority suggesting that an order appointing a GAL is not an appealable order. (*In re Marriage of Lloyd* (1997) 55 Cal.App.4th 216, 219.) The decision in *Lloyd, supra*, however, is not authoritative in a probate context since the ruling was rendered in a family law context in connection with a post-judgment order appointing a GAL. The appellate court noted that “not every post-judgment order is appealable.” (*Ibid.*)

Respondent’s motion to dismiss cited *In re Estate of Corotto* ((1954) 125 Cal.App.2d 314, 324, that an order appointing a guardian ad litem in a probate proceeding is not an appealable order. However, it should be noted that the *Corotto* decision was rendered at a time when

GAL appointments were made pursuant to the Code of Civil Procedure. Probate Code Section 1003 authorizing appointment of a GAL was not enacted until 1990. (Stats. 1990, Ch. 79.) Probate Code Section 1300 authorizing appeals from an order “authorizing, instructing, or directing a fiduciary” was not enacted until 1990 and therefore would supercede the *Corrotto* decision which was made some 36 years before.

Respondent also cited *In re Marriage of Caballero* (1994) 27 Cal.App.4th 1139, 1149 for the same proposition. That case involved divorce proceeding and thus would depend on the appealability of orders under the Code of Civil Procedure and not the Probate Code. The opinion in *Caballero* referenced a decision of this Court (*In re Hathaway* (1896) 111 Cal.270, 271) when it stated “An order appointing a guardian ad litem or revoking an appointment is not appealable.”

While statutory and judicial precedents strongly support the proposition that a GAL is a fiduciary and that an order authorizing, instructing, or directing a GAL is an appealable order under Probate Code Section 1300, the decisions in *Corotto*, *Caballeero*, and *Hathaway*, cloud the issue and make the precedential waters a bit murky.

Review should be granted to clarify that a GAL is a fiduciary within the meaning of Probate Code Section 1300 and that an order authorizing someone to act as a GAL and instructing or directing the person on their duties as a GAL is an appealable order. Trial courts, attorneys, and litigants in these proceedings need such guidance.

Reframing the Issue on Review

Petitioner’s description of the issue presented for review has three dimensions. (Petition for Review, p. 4) *Amicus Curiae* urges this Court to grant review on the third part which relates to the appealability of an order appointing a limited GAL for an litigant against his wishes.

In order to remove any ambiguities concerning this important question of appealability and in order to resolve apparent conflicts on the matter, this Court should reframe the issue presented for review as follows:

Is a guardian ad litem a “fiduciary” within the meaning of Probate Code Section 1300, thus making appealable an order authorizing or instructing or directing a guardian ad litem in a proceeding under the Probate Code?

Answering this question will provide clarity to many seniors and adults with actual or perceived disabilities who may be subject to GAL appointments which are occurring in California probate courts with increasing frequency. As the “silver tsunami” hits California’s courts with greater force in the coming years – with scores of additional “Baby Boomers” entering their 70s and 80s – trial courts will benefit by receiving guidance from this Court on such an important issue.

Alternative to Grant Review and Remand

If the Court does not grant review to consider the merits of the reframed issue, it could grant review and remand the case to the Court of Appeal to decide the issue. The Court of Appeal did not decide the appealability of the trial court's order authorizing Margaret Lodise to act as GAL and instructing her as to her duties because it perceived that "the parties appear to agree that the order appointing the GAL is not appealable." (Slip Opinion, p. 10) In fact, the parties did not stipulate to that proposition nor did appellant specifically concede that point. The issue was not decided by the Court of Appeal because it erroneously perceived that resolution of the matter was not necessary.

Because of the order dismissing the appeal, petitioner was never allowed to argue that the trial court's order authorizing and instructing the GAL, based on its perception that Mr. Lund lacked litigation capacity due to a mental disability, violated federal due process as well as federal and state nondiscrimination laws. He was therefore denied due process on appeal based on an erroneous perception by the appellate court that the issue of appealability of the GAL order had been withdrawn by mutual agreement of the parties – something that in fact never occurred.

This case involves a due process violation in the trial court based on an unsubstantiated perception of disability as well as a due process violation on appeal based on an unsubstantiated perception that the parties "appear to agree" rather than an actual agreement to withdraw the issue of the appealability of the GAL order. To correct the latter problem, this Court could grant review and remand the case to the Court of Appeal to consider *and decide* the appealability of the GAL order. If resolved favorably, this would give Mr. Lund an opportunity to argue why the GAL order should be reversed.

Prayer

For the foregoing reasons, *amicus curiae* requests this Court to grant the petition for review and either: (1) reframe the issue presented as suggested by *amicus curiae* and decide it on the merits; or (2) grant review and remand the case to the Court of Appeal with instructions to decide the reframed issue of appealability of the GAL order, with instructions to conduct further proceedings once that issue is decided.

Respectfully submitted:



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(See attached proof of service)

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(Served Via TrueFiling)

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PROOF OF SERVICE

I am over the age of 18 years of age, and am not a party to the within action; my current business address is 1717 E. Vista Chino A7-384, Palm Springs, CA 92262.

On April 3, 2020, I served an "Amicus Curiae Letter" on the interested parties in this action by placing true copies thereof in sealed envelopes, with postage fully prepaid, and deposited them in the United States mail at Palm Springs, CA:

PERSONS SERVED: (via postal mail)

Los Angeles Superior Court
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Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 3, 2020, at Palm Springs, CA.

Michael A. Vasquez
MICHAEL A. VASQUEZ