

The Role of the Guardian Ad Litem

{ A View From the Bench and Best Practices

- Definition: A GAL is a guardian is a person appointed by the court to appear in a lawsuit on behalf of an incompetent party. Black's Law Dictionary (9th ed. 2009).
- "In effect the court is the guardian [of an incompetent party], and the person named as guardian ad litem is an officer of the court appointing him and is the agent of the court. 'He is like an agent with limited powers.' *Berry v. Chaplin* (1946) 74 Cal.App.2d 652, 657 (quoting *Cole v. Superior Court* (1983) 63 Cal. 86, 89). See also *Serway v. Galentine* (1946) 75 Cal.App.2d 86, 89 ("The court is, in effect, the guardian of the [incompetent] and the guardian ad litem is but an officer and representative of the court.").
- A GAL is entitled to quasi-judicial immunity, as the role of the GAL is "a function intimately related to the judicial process." *McClintock v. West* (2013) 219 Cal.App.4th 540, 550-551.

WHAT is a GAL?

- The historical origin for a GAL is the doctrine of *parens patriae*, Latin for "parent of the people." Under *parens patriae*, the King of England was the country's parent with the duty to protect his disabled citizens. See *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 535.
- Present day authority—two statutes: Code of Civil Procedure section 372 & Probate Code section 1003.
- A GAL may be appointed by the court to represent the interest of any of the following persons: 1) a minor, 2) an incapacitated person, 3) an unborn person, 4) an unascertained person, or 5) a person whose identity or address is unknown. Prob. Code §1003.

■ Authority for Appointment

- “The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of the property of the estate involved or by the petitioner or from such other source as the court orders. Prob. Code §1003(c).
 - Determined by the Court: Since the court has effectively hired the GAL, and the GAL is an agent of the court, the court has the exclusive responsibility to set and award fees.
 - From the Estate Involved or From Such Other Source: GAL fees often are paid from the ward’s estate. However, the court has broad discretion, and could determine GAL fees to be a general administrative cost or even paid by a party or parties in a legal proceeding.

■ GAL Fees

- A GAL may control litigation strategy and waive procedural rights (such as waiving notice or even the right to a jury trial). *In re Sara D.* (2001) 87 Cal.App.4th 661, 668.
- No authority to settle or compromise substantive rights: A GAL has no authority to enter into an agreement compromising the claims of his or her charge without the approval of the court that appointed the GAL. *Scruton v. Korean Air Lines* (1995) 39 Cal.App.4th 1596.
- A GAL protects and manages legal rights, *Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 47, but does not have the authority to receive or manage a ward's assets or property, *Poaster v. Superior Court* (1993) 20 Cal. App. 4th 948, 951-952.

■ Authority of GAL

- A GAL is not acting as a court-appointed attorney. Thus, a GAL does not have a “client.”
- Absent a client, there is:
 - No attorney-client privilege;
 - No duty of confidentiality; and
 - No duty of loyalty to a client.
- A GAL nevertheless has a fiduciary duty to ascertain and act solely in the best interest of her ward.
- A GAL is not an advocate. “[T]he GAL does not advocate for her client the way an attorney does – her job is acting in the ward’s best interest, and the ward may not agree with the GAL’s decisions.” *McClintock v. West* (2013) 219 Cal.App.4th 540, 551-552.

What a GAL is not

- A GAL is not a party. The GAL's role is "more than an attorney, but less than a party's." *In re Christina B.* (1993) 19 Cal.App.4th 1441, 1454.
- A GAL, however, is a party for discovery purposes and is not exempt from the rules of discovery. *Regency Health Services v. Superior Court* (1998) 64 Cal.App.4th 1496, 1503-1504.
- A GAL can be called as a witness.

WHAT is a GAL? (Part II)

- A GAL may be, but is not required to be, a licensed attorney. CEB, Cal. Cons. Practice, §7.7
- A private professional fiduciary may serve as a GAL.
- A parent may serve as a GAL. But see, Alameda County Local Rules of Court, rule 7.780 (must be disinterested for a minor's compromise).
- There is no order of preference or priority for appointment of a GAL. Rather, the appointment is left to the discretion of the trial court. *D. G. v. Superior Court* (1979) 100 Cal.App.3d 535, 546.

WHO may serve as a GAL

- Probate Code §1003(a)(2) authorizes the court to appoint a GAL at any stage of a proceeding...” to represent the interests of an incapacitated person if the court determines that representation of the interest would otherwise be inadequate... .”
- A GAL likely will be appointed in a proceeding in which the legal and/or financial interest of an incompetent person is being adjudicated or determined. Code of Civ. Pro. §372.

When/Why a GAL

- In practice, a GAL may be appointed where there are conflicting positions on the best interest of an incompetent individual, and the court would like a neutral to investigate and report back. *In re Estate of Snowball* (1909) 156 Cal. 235, 237.
- Most of the authority on GALs is found in relation to a GAL for a minor under Code of Civil Procedure section 372. However, the legal principals involved and analysis is the same as for a GAL under the Probate Code.

When/Why a GAL II

- Common Scenarios for Appointment of GAL:
 - GAL may be appointed for a person who has not yet been conserved. CCP §372- §373. *See In re Sarah D* (2001) 887 Cal.App.4th 661, 667.)
 - Where there is a *prima facie* showing of potential undue influence.
 - Three ring circus. Too many parties with grossly divergent sensibilities and allegations.
 - Allegations of fiduciary malfeasance. Lack of beneficiary or heir holding a similar or related interest, and who is competent and willing to protect that interest.
 - Post establishment of a conservatorship. If the court has concerns that the interests of the conservatee are not being adequately protected by the conservator.

Common Scenarios

- In a Probate Code section 3100 petition (disposition of community property), the court may appoint a GAL for a spouse alleged to lack capacity. See Prob. Code § 3140.

- Argument that a GAL should not be appointed prior to the establishment of a conservatorship.
 - Because there has been no legal determination of incapacity of an adult who has not been conserved.
 - Because there is a rebuttable presumption that all adults have capacity. See Prob. Code §810.
 - But see Probate Code section 1003(a)(2) (authorizing the court to appoint a GAL at any stage of the proceeding to represent the interests of an incapacitated person).

■ Common Scenarios II

- Use Mandatory Judicial Council forms:
 - DE-350/GC-100, Petition for Appointment of GAL
 - DE-351-GC-1-1, Order for Appointment of GAL
- Item 5: Box is usually checked to indicate that the GAL is not authorized to waive or disclaim any substantive rights.
- Item 6/Other: Role of GAL may be specified. Often left blank.
 - Sometimes the description is general or left blank, such as “investigate and report to the court.”
 - It may be preferable to have specific or limiting instructions, such as “investigate and report to the court regarding all financial matters of the settlor.”
- Appointments can be by court acting *sua sponte* and noted in court’s minutes, but it is preferable to have a formal order.
- Process varies by county and by context. Some counties allow a party to request the appointment of a specific GAL and, absent objection, the requested GAL is often appointed.

How a GAL is Appointed

- Where the GAL order is general, and lacks specific or limiting charge:
 - A GAL has a general duty to investigate or know the individual circumstances of the ward. *D.G. v. Superior Court* (1979) 100 Cal.App.3d 535, 544.
 - Absent specific or limiting instructions, the factual issues raised in the pleadings outline the general scope of the GAL's inquiry and investigation.
- Even if charge limited, a GAL should also identify and report to the court any new potential legal claims or property rights which arise during the investigation.
- Point out inconsistencies, isolation, and changes in relations or values.
- Rather than taking a position, in her report the GAL should request instruction from the court, especially as to new claims.
- It is like a box of chocolates: you never know what you are going to get.

The GAL Report

- Document Review:
 - Pleadings
 - Estate Plans and Transfer Documents
 - Other documents: e.g., bank records, medical records
 - Pre-Dispute Correspondence
- Sources of Information:
 - Background and context – of dispute and parties
 - Thorough Interview of Ward: Assessment of capacity; personal, professional, and value history; relationships; and interference with support relationships.
 - Interview of 3rd Parties – Parties to legal proceeding, family members, neighbors, caregivers.
- Formal Discovery? Subpoena records?

The GAL Report II

- Probate Code §810(a): Rebuttable presumption of capacity
- Probate Code §810(c): A nuanced, skills-based determination of capacity based on evidence of a deficit in one or more of the person's mental functions.
- Probate Code §811(a): Lists mental functions to be assessed, and requires a finding of a correlation between the functional deficit and the decision or act in question.
- Probate Code §812 defines lack of capacity inversely

Assessment of Capacity

- Other Authority:
 - Probate Code §6100.5 – Testamentary capacity:
When an instrument more closely resembles a will or codicil in its content and complexity. See *Lintz v. Lintz* (2014) 222 Cal. App.4th 1346, 1342.
 - Probate Code §4609: Capacity for health care decisions

Assessment of Capacity II

- Civil Code §1556: Presumption of capacity to contract
- Civil Code §39: Rebuttable presumption affecting the burden of proof that a person is of unsound mind (for purposes of enforcement of a contract) if a person is substantially unable to manage his or her financial resources or resist fraud or undue influence.

Assessment of Capacity III

- A GAL should report observations, conversations, confusion (or lack thereof) that occurred during interview with the ward/settlor/conservatee.
- Evidence Code §730 Evaluation: A GAL can recommend that the court, on its own motion, appoint an expert to render a report. In select cases, it may be helpful to have a neuropsychological evaluation.

Assessment of Capacity IV

- Specific Case: A GAL is only appointed/authorized to act in a specific case.
 - A GAL would need a specific instruction from the court to participate in or initiate another proceeding.
- Ability to Talk to Parties: Because a GAL is not representing anyone, a GAL is not in violation of rule 4.2 of the California Rules of Professional Conduct (prohibiting an attorney from communicating with a represented party).
- Best practice: GAL should work with and through counsel, and copy counsel on all communications with parties.

The GAL in Litigation

- Affirmative Filings or Objections:
 - Because the court is the guardian, and the GAL is the investigator for the court (charged with understanding the legal rights and individual circumstances of the ward), the GAL should be circumspect before making an objection or affirmative filing, absent instruction.
 - Typically, a report of the GAL investigation is sufficient to highlight issues, concerns, or problems without filing a complaint, petition, or objection. See *Berry v. Chaplin*, 74 Cal.App.2d at 657 (court charged with protecting ward's interests).

The GAL in Litigation II

- No Authority to Settle: A GAL has no authority to enter into an agreement compromising the claims of his or her charge without the sanction of the court that appointed the GAL.
- Use of Judicial Council Form MC-350:
 - Technically use of this form is mandatory for presenting a settlement for approval by the court.
 - In practice, most probate departments will accept a prose petition with the settlement attached.
 - The MC-350 is cumbersome and designed for personal injury settlements.

The GAL in Litigation III

- The best settlements for one's client are the result of the application of leverage.
 - Instruction from the court
 - Sympathy of a vulnerable ward at trial
- A disinterested neutral is brought in to bring a critical eye — that the GAL will question and verify.
- Trust the Adversarial System!

Negotiation is Litigation

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