

Court of Appeals No. 71917-3-I

COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

In Re The Marriage Of:

GEORGE LANE,

Respondent,

v.

SHARON LANE,

Appellant

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INITIAL REPLY BRIEF OF GEORGE LANE

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE – BACKGROUND.....	2
a. There Is No Dispute That Sharon Lane Is Incompetent.....	2
b. Appropriate Amounts of Discovery Were Done.....	4
c. Costs of trial were an important consideration.....	5
IV. ARGUMENT.....	5
a. Standard of Review.....	6
b. Mrs. Lane Was Incapacitated.....	7
c. Sharon Lane Could Not Represent Herself.....	8
d. A Due Process Right To A Trial Depends On The Interest Being Affected.....	9
e. Washington Courts, In A Divorce, Have Never Found Trial Is A “Substantial Right” That Outweighs All Other Factors.....	17
f. The LGAL Had Authority To Enter Into A CR 2A Agreement.....	21
g. A Valid CR 2A Agreement Acts To Bar A Party’s Right To A Trial.	23
h. The LGAL Acted Properly In The Case.....	24
i. Allowing The Case To Proceed Would Have Impacted Mr. Lane’s Due Process Rights.....	27
j. The Trial Court Was Correct In Approving The Settlement.....	29
V. CONCLUSION.....	33

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Callie v. Near</u> , 829 F.2d 888, 890 (9 th Circ. 1987)	6
<u>Mathews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	1, 13, 14, 16, 17, 19, 28

STATE CASES

<u>In re Marriage of Blakely</u> , 111 Wash.App. 351, 44 P.3d 924 (2002) <u>review denied</u> , 148 Wash.2d 1003, 60 P.3d 1211 (2003).....	1, 8
<u>Lavigne v. Green</u> , 106 Wash.App. 12, 23 P.3d 515 (2001).....	2, 23
<u>In re Marriage of Kovacs</u> , 121 Wn.2d 975, 854 P.2d 629 (1993)	6
<u>Atwood v. Shanks</u> , 91 Wn. App. 404, 958 P.2d 332 (1998).....	6, 7
<u>In re Marriage of Fiorito</u> , 112 Wn. App. 657, 50 P.3d 298 (2002).....	6
<u>Roller v. Dep't of Labor & Indus.</u> , 128 Wash.App. 922, 117 P.3d 385 (2005)	6
<u>Malang v. Dep't of Labor & Indus.</u> , 139 Wash.App. 677, 162 P.3d 450 (2007).....	6
<u>Morris v. Maks</u> , 69 Wash. App. 865, 850 P.2d 1357 (1993).....	6
<u>In re Patterson</u> , 93 Wn.App. 579, 969 P.2d 1106 (1999).....	6, 29
<u>Snyder v. Tompkins</u> , 20 Wn.App. 167, 579 P.2d 994 (1978)	7, 29
<u>Wash. Asphalt Co. v. Harold Kaeser Co.</u> , 51 Wn.2d 89, 316 P.2d 126 (1957).....	7, 30
<u>Welfare of Houts</u> , 7 Wash.App.476, 499 P.2d 1276 (1972).....	8, 9, 14
<u>Welfare of Dill</u> , 60 Wash.2d 148, 372 P.2d 541 (1962)	1, 8, 12, 19, 21
<u>Guardianship of Cornelius</u> , 181 Wash.App. 513, 326 P.3d 718 (2014)	9, 11, 12
<u>Guardianship of K.M.</u> , 62 Wash.App. 811, 816 P.2d 71 (1991)	10
<u>Quesnell v. State</u> , 83 Wash.2d 224, 517 P.2d 568 (1974)	10
<u>In Re Welfare of H.Q.</u> , 182 Wash.App. 541, 330 P.3d 195 (2014).....	10, 11

<u>In re Adoption of Infant Boy Crews</u> , 60 Wash.App. 202, 803 P.2d 24 (1991)	11
<u>In re Adoption of Hernandez</u> , 25 Wash.App. 447, 607 P.2d 879 (1980)	11
<u>Soundgarden v. Eiekenberry</u> , 123 Wash.2d 750, 871 P.2d 100 (1999).....	11
<u>Detention Of Morgan</u> , 161 Wash.App. 66, P.3d 394 (2011).....	1, 12, 13
<u>Marriage of Ebbighausen</u> , 42 Wash.App. 99, 708 P.2d 120 (1985)	12
<u>In re Det. of Stout</u> , 159 Wash.2d 357, 370, 150 P.3d 86 (2007).....	13
<u>Welfare of L.R.</u> , 180 Wash.App. 717, 324 P.3d 737 (2014)	14
<u>In re Marriage of Gannon</u> , 104 Wash.2d 121, 702 P.2d 465, 467 (Wash.,1985) ...	18
<u>Jones v. Minc</u> , 77 Wash.2d 381, 462 P.2d 927 (1969)	18
<u>Miller’s Guardianship</u> , 26 Wash.2d 202, 173 P.2d 538 (1946)	18, 19, 21
<u>Gourley v. Gourley</u> , 158 Wash.2d 460, 145 P.3d 1185 (Wash.,2006)	1, 19, 20
<u>Rupe v. Robinson</u> , 139 Wash. 592, 247 P. 954 (1926).....	1, 21
<u>Howard v. Dimaggio</u> , 70 Wash.App. 734, 855 P.2d 335 (1993).....	22
<u>Marriage of Ferree</u> , 71 Wash.App 35, 856 P2d 706 (1993)	23
<u>Guardianship of Matthews</u> , 156 Wash.App. 201, 232 P.3d 1140 (2010).....	25
<u>In Re Disciplinary Proceedings Against Jones</u> , 338 P.3d 842 (2014)	26

WASHINGTON STATE STATUTES

RCW 4.08.060	1, 8, 12, 20
RCW 74.34.....	2
RCW 26.50.060	19

COURT RULES

RAP 18.1	34
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GALR 2(a)	26
RPC 3.1	26
RPC 8.4(d)	26

FOREIGN CASES

<u>Golin v. Allenby</u> , 90 Cal. App. 4 th 616, 643, 118 Cal.Rptr.3d 762 (California 2010).....	21
<u>Marriage of Caballero</u> , 27 Cal.App. 4 th 1139 (California 1994).....	22

I. INTRODUCTION

COMES NOW Respondent, George Lane, by and through counsel of record, and replies to the Brief of Appellant as follows.

II. REPLY – ASSIGNMENTS OF ERROR

Assignment of Error 1. The trial court did not err by ruling that Ms. Lane did not have a substantial right to a trial on the merits. In a divorce context, with respect to property division and maintenance, Washington courts have never found that the right to a trial trumps all other factors. The correct analysis is the balancing test under Detention Of Morgan, 161 Wash.App. 66, 74, P.3d 394 (2011) and Gourley v. Gourley, 158 Wash.2d 460, 467-469, 145 P.3d 1185 (Wash.,2006), both citing to Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Assignment of Error 2. The trial court did not err by ruling that the LGAL had the authority to enter a settlement agreement on Ms. Lane's behalf. The LGAL had full statutory authority under RCW 4.08.060 and Blakely to negotiate and agree to a settlement of the divorce. Washington case law, from Rupe v. Robinson, 139 Wash. 592, 247 P. 954 (1926), through Welfare of Dill, 60 Wash.2d 148, 150, 372 P.2d 541 (1962).

Assignments of Error 3-6. The trial court did not err by enforcing

the CR 2A Agreement and entering the Decree of Dissolution, including the Findings of Fact; Order of Child Support; and a final Parenting Plan. Under a long line of established Washington law, a CR 2A Agreement, properly entered into, is binding on the parties. Lavigne v. Green, 106 Wash.App. 12, 14, 23 P.3d 515 (2001).

III. STATEMENT OF THE CASE – BACKGROUND

While much of Appellant’s statement of the case is accurate, Ms. Lane ignores most of the actual evidence in the case.

a. There Is No Dispute That Sharon Lane Is Incompetent. We note that Appellant does not assign error to the Commissioner’s initial Order, finding she was incompetent and appointing Ms. Gilliam as the LGAL. Facts or rulings which are not assigned as errors are verities on appeal.

Originally, her own attorney, Landon Gibson III, asked for a Title 4 GAL to be appointed. CP at 39, indicating that he believed, based on his interaction with her, that she needed an LGAL to be appointed. CP at 38-39.

In the hearing which appointed Ms. Gilliam, at the Commissioner level, Ms. Lane was afforded an opportunity to be heard. She submitted a declaration where she testified she had suffered a brain injury and was a vulnerable adult under RCW 74.34. CP at 10. She also testified in her own

behalf for 15 minutes. RP at 5. There were many police reports and a Forensic Mental Health Report which showed quite clearly she had problems. She had attacked her husband with a baseball bat; assaulted their son; and was otherwise a major risk to both of them. CP at 46. CP at 46; CP at 75-79; numerous police and incident reports at CP 95-184.

Commissioner Ponomarchuk found that she needed an LGAL, and appointed Ms. Gilliam to serve as LGAL under RCW 4.09.060. That order was never revised or appealed, and there is **no** argument here that the Commissioner was wrong. RP at 5; CP at 203-204.

Pursuant to the court's order, Ms. Gilliam did a preliminary investigation as to whether Ms. Lane was incapacitated, and submitted a report to the court. CP at 207-210. She had a lengthy phone conversation with Ms. Lane. CP at 209. Ms. Gilliam discussed the issue with Mr. Gibson, and they both agreed a personal meeting would not add any significant insight or information to her investigation. CP at 209. Her detailed billing at CP 214-215 show a great deal of work, and close coordination with Mr. Gibson as to what Ms. Lane wanted and needed. She recommended that an LGAL be appointed. Mr. Gibson agreed. CP at 216-217.

On April 14, 2010, Ms. Gilliam filed a motion seeking to clarify the exact issue here; whether or not she had the authority to settle the case; and whether Ms. Lane had such a “substantial right to trial”, that could not be waived by an LGAL’s agreement over Ms. Lane’s objections. CP at 283-292.

Ms. Lane strongly objected to the LGAL settling the case. CP at 309. In a lengthy declaration, she laid out her argument that George Lane was actually the abuser, among a lengthy list of her claims. CP at 209-323. She claimed George had spent \$806,943 of her money over the course of the marriage. CP at 326. She claimed she was not mentally ill.

The FCS Risk Assessments showed clearly that she had mental health problems and was a risk to Mr. Lane. CP at 626; 643-652; 653-659. The confidential report of Ms. Gilliam also showed a woman with severe mental health problems. CP at 635. Ms. Lane had problems that impaired her ability to communicate with her own attorney. CP at 636-640. Ms. Gilliam recommended, in fact, that her relatives consider a guardianship proceeding. CP at 640-641.

b. Appropriate Amounts of Discovery Were Done. Both counsel discussed, in the trial court’s hearing, as to the extent of discovery. Her attorney, Landon Gibson, did the discovery he felt was appropriate. RP at

10-11. Mr. Lane's counsel told the court, that Mr. Lane has provided voluntarily all the information that Mr. Gibson had asked for. RP at 15-16. Both sides were very aware that there were limited assets in the case. Mr. Gibson and Ms. Gilliam did not object to that characterization. Mr. Gibson and Ms. Gilliam clearly did not believe Ms. Lane's story of vast assets and income.

c. Costs of trial were an important consideration. The trial court was very cognizant that trial is an expensive undertaking, and would eat up the limited assets in the estate. RP at 5; CP at 412. By the time of the hearing, Mr. Lane had about \$10,000 in his checking and savings account. CP at 413.

In this case, the husband was more than cooperative. He had complied with all discovery; he had supplied any and all financial materials Ms. Lane's attorney had requested. RP at 15. He had a protection order against his wife. CP at 66. Ms. Lane had a history of violating prior protection orders. CP at 626; 643-652; 653-659. Mr. Gibson had decided, on his own, what discovery to conduct. RP at 11. It was clear from his statements in court, that in his considered judgment as to what discovery was worth doing, and what "assets" were worth pursuing, were not what Ms. Lane wanted him to do. RP at 11.

IV. ARGUMENT

a. **Standard of Review.** Generally, a trial court's rulings in dissolutions are reviewed for abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 975, 801, 854 P.2d 629 (1993). A trial court abuses its discretion when its decision is arbitrary, manifestly unreasonable, or based upon untenable grounds. Atwood v. Shanks, 91 Wn. App. 404, 409, 958 P.2d 332 (1998). A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard. In re Marriage of Fiorito, 112 Wn. App. 657, 664, 50 P.3d 298 (2002). It is based on untenable grounds if the factual findings are unsupported by the record. Fiorito, 112 Wn. App. at 664. A trial court necessarily abuses its discretion if its ruling is based upon an erroneous view of the law. Atwood, 91 Wn. App. at 409.

Undisputed facts are verities on appeal. Roller v. Dep't of Labor & Indus., 128 Wash.App. 922, 927, 117 P.3d 385 (2005); Malang v. Dep't of Labor & Indus., 139 Wash.App. 677, 683–84, 162 P.3d 450 (2007).

A trial court's decision to enforce a settlement agreement pursuant to CR 2A is reviewed under the abuse of discretion standard. Morris v. Maks, 69 Wash. App. 865, 850 P.2d 1357 (1993), citing to Callie v. Near, 829 F.2d 888, 890 (9th Circ. 1987); also In re Patterson, 93 Wn.App. 579, 586, 969 P.2d 1106 (1999). A trial court's determination that the parties

fully appreciated the terms of the settlement will not be disturbed where it is supported by the evidence. Snyder v. Tompkins, 20 Wn.App. 167, 173–74, 579 P.2d 994 (1978).

Courts are inclined to view stipulated settlements as final. Snyder at 173. A judgment by consent will not be reviewed on appeal absent fraud, mistake, or want of jurisdiction. Wash. Asphalt Co. v. Harold Kaeser Co., 51 Wn.2d 89, 91, 316 P.2d 126 (1957).

In this case, the proper procedures were followed. Ms. Gilliam did a thorough investigation. Ms. Lane’s own attorney, following her wishes, and advocating for her, did the discovery and investigation that he felt was appropriate. Mr. Gibson is an experienced and very competent family law attorney; there is no argument on appeal that he fell short. Where both attorneys felt most of Ms. Lane’s claims were groundless, it is hard to see any negligence.

b. Mrs. Lane Was Incapacitated. There is no dispute that Ms. Lane was mentally incapacitated to the point where she could not meaningfully participate in her own case. Her own attorney, Mr. Gibson, had requested the appointment of an LGAL, because, he told the court, she was so incapacitated that she could not assist in her own case. At that initial motion, Ms. Lane testified for herself for fifteen minutes. RP at 5. Commissioner Ponomarchuk found that she was

mentally unable to assist in her own divorce, and appointed Ms. Gilliam as LGAL. This order was not taken up on revision or appealed, and is a verity in the appeal.

The appointment was made under RCW 4.08.060 and In re Marriage of Blakely, 111 Wash.App. 351, 353, 44 P.3d 924 (2002), review denied, 148 Wash.2d 1003, 60 P.3d 1211 (2003). It met the notice requirement under Welfare of Houts, 7 Wash.App.476, 499 P.2d 1276 (1972), that the incompetent was entitled to be heard.

c. Sharon Lane Could Not Represent Herself. Appellant further argues that Ms. Lane had a right to go to trial, to argue her view of the case, regardless of the decisions by the LGAL. That is not correct. RCW 4.08.060 provides in part: “When an insane person is a party to an action... he shall appear by guardian, or if he has no guardian... the court shall appoint one...” RCW 4.08.060.

Under Welfare of Dill, 60 Wash.2d 148, 150, 372 P.2d 541 (1962), a person under such legal disability can appear in court only through the guardian ad litem. Dill at 150. Ms. Lane could not prosecute her case or take it to trial. That could be done only through a GAL.

There is another point here. Clearly many of Ms. Lane’s claims are outlandish and not believable. But Ms. Lane really, really wants to have a trial so she can testify as to all of this. It was obvious Ms. Gilliam and Mr. Gibson (and everyone else), simply do not believe

REPLY BRIEF OF RESPONDENT 8

many of her claims. It is also true that some of her claims (for example, that Ms. Lane should have to pay her back for money they spent during the marriage), are simply not valid legal claims. To order that the LGAL is required to take the case to trial, and argue for bad legal positions, and put on testimony that she knows is untrue, simply to allow Ms. Lane a public trial to have her day in court, is against common sense and the RPC's.

d. A Due Process Right To A Trial Depends On The Interest Being Affected.

Washington courts have interpreted due process requirements differently, depending on the interest being affected. For due process protections to be implicated, there must be an individual interest asserted that is encompassed within the protection of life, liberty, or property. Guardianship of Cornelius, 181 Wash.App. 513, 530, 326 P.3d 718 (2014). At a minimum, they include an opportunity to be heard. Cornelius, at 530.

Due process protections go back many years. In Welfare of Houts, the court found that a parent has a due process right to be heard before a court permanently deprives them of a child. Houts at 481. Houts notes a parent's deprivation of a child is a right protected by the US and State constitutions. Houts at 481. Houts goes on to note that an attorney, without special authority, cannot stipulate away a valuable right of his client. Houts at 481. But Houts is quite different from the

REPLY BRIEF OF RESPONDENT 9

present case. Ms. Lane had an attorney of her own. The LGAL was not her attorney; Mr. Gibson was. Mr. Gibson did not stipulate away anything. **Mr. Gibson did, in fact, represent her in the reasonableness hearing, in an adversarial fashion.**

There is no question that where critical liberty interests are implicated, the courts apply a high level of protection. In Guardianship of K.M., 62 Wash.App. 811, 815, 816 P.2d 71 (1991), a case involving sterilization of an incompetent minor, the court independent legal counsel to be appointed, to represent the minor, in an adversarial manner, even where a GAL had been appointed. K.M. at 815.

Similarly, in both Quesnell v. State, 83 Wash.2d 224, 517 P.2d 568 (1974), and Welfare of H.Q., 182 Wash.App. 541, 330 P.3d 195 (2014), a critical personal liberty interest was implicated.

Quesnell was a case involving the civil commitment of an insane person. There, the court indicated that the liberty rights of a person required the utmost in due process, including consulting with the disabled person. Quesnell at 230. The court stated “Fourteenth Amendment due process requires that the infirm person, or one acting in his behalf, be fully advised of his rights and accorded each of them unless knowingly and understandingly waived.” Quesnell at 230. The Quesnell court civilly committing the defendant to incarceration. Quesnell at 237. That is much more serious liberty interest, we argue, than dividing assets and awarding maintenance in a divorce. Ms. Lane
REPLY BRIEF OF RESPONDENT 10

is not committed; her personal liberty is not diminished in the slightest; she has lost none of her ability to vote, to spend money, to travel as she wishes, etc.

Similarly, in Welfare of H.Q., 182 Wash.App. 541, 330 P.3d 195 (2014), the court found that relinquishing parental rights is a fundamental liberty interest. H.Q. at 201. But as well, the court noted that voluntary relinquishment of parental rights does not trigger any due process concerns, because there was no state action. In re Welfare of H.Q. at 200, citing In re Adoption of Infant Boy Crews, 60 Wash.App. 202, 217–18, 803 P.2d 24 (1991); In re Adoption of Hernandez, 25 Wash.App. 447, 452, 607 P.2d 879 (1980). Again, relinquishing parental rights is a much more fundamental liberty interest than dividing assets in a divorce.

In Guardianship of Cornelius, 181 Wash.App. 513, 326 P.3d 718 (2014), the incapacitated mother objected to being removed as guardian of her child. The court noted that where a liberty or property interest is at stake, due process, at a minimum, requires notice and an opportunity to be heard. Cornelius at 530, citing Soundgarden v. Eiekenberry, 123 Wash.2d 750, 768, 871 P.2d 100 (1999).

At the same time, courts have found that all liberty or property interests are not the same. Cornelius declined, for example, to extend the same protection to the relationship between a parent and an adult child, as that of a parent and a minor child. Cornelius at 530.

Cornelius did not find that the mother had a due process right to a trial that took precedence over any settlement. In the present case, we argue that under the Cornelius test, due process requirements were met when the trial court had a reasonableness hearing, at which Ms. Lane appeared and was represented by counsel.

Marriage of Ebbighausen, 42 Wash.App. 99, 708 P.2d 120 (1985), is not relevant. The attorneys did not meet without the parties, in this case. Both sides, in mediation, had attorneys; and Ms. Lane's interests were dealt with by Ms. Gilliam.

While courts have been of due process rights where a fundamental liberty interest is implicated, the right to trial is not absolute.

For example, in Detention Of Morgan, 161 Wash.App. 66, 74, P.3d 394 (2011), a case where a sex offender appealed his civil commitment, the court found that the defendant had a right to be present at proceedings where his presence had a "reasonably substantial" relation to the fullness of his opportunity to defend against charges. Morgan at 74. (Notably, the court found that appointment of a GAL under 4.08.060 was a critical procedural safeguard, which weighed in favor of finding his due process rights had not been violated. Morgan at 79.) Morgan also noted that a GAL has complete statutory authority, citing Dill at 150.

The court then went on to deny Morgan's appeal. It found that procedural due process "[a]t its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a given context." Morgan at 78, citing In re Det. of Stout, 159 Wash.2d 357, 370, 150 P.3d 86 (2007) (citing Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Morgan goes on state:

To determine what procedural due process requires in a particular context, we employ the Mathews test, balancing three factors: "(1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures." Stout, 159 Wash.2d at 370, 150 P.3d 86 (citing Mathews, 424 U.S. at 335, 96 S.Ct. 893). Morgan at 78.

While it is true that this is not a civil commitment of a sex offender, it is also true that civil commitment implicates a much greater personal liberty interest than the division of assets in a divorce.

In considering whether Ms. Lane's right to a trial trumps everything else, the court should use the Mathews balancing test. After all, if it is an appropriate test to use when taking away someone's liberty, it is surely appropriate to use when deciding if an LGAL can settle the division of assets and maintenance in a divorce.

The courts have approved a Mathews analysis in family law cases as well. In 14, the court stated:

The right to be heard “ordinarily includes the right to be present.” *In re Welfare of Houts*, 7 Wash.App. 476, 481, 499 P.2d 1276 (1972). However, there is no absolute *724 right for an incarcerated parent to personally attend a termination proceeding or to appear telephonically. *In re Dependency of M.S.*, 98 Wash.App. 91, 94–96, 988 P.2d 488 (1999); *see also Darrow*, 32 Wash.App. at 808, 649 P.2d 858....

In determining whether a parent has received adequate due process, we must balance the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *In re Dependency of C.R.B.*, 62 Wash.App. 608, 614–15, 814 P.2d 1197 (1991). The *Mathews* balancing test requires weighing: (1) the parent's interests, (2) the risk of error created by the procedures used, and (3) the State's interests. *C.R.B.*, 62 Wash.App. at 614–15, 814 P.2d 1197; *see also J.W.*, 90 Wash.App. at 429, 953 P.2d 104 (*Mathews* factors used to determine adequacy of procedure in dependency hearing)

In re Welfare of L.R. 180 Wash.App. 717, 723-724, 324 P.3d 737, 740 (Wash.App. Div. 2,2014)

A Mathews analysis in this case show:

(1) The private interest affected. This is not terminating Ms. Lane’s parental rights. This is not taking away her liberty, nor is this a case of sterilizing her. This is not taking away her right to vote, to drive, to sign contracts, or to get married. This is a division of community assets and an award of maintenance. In fact, it is even narrower than that: it is a question of whether she should have gotten more than 55% of the community assets, or slightly more maintenance.

This is not what Ms. Lane actually wants, of course. In the hearing, it was obvious she wanted to show that Mr. Lane had spent

\$806,943 of her money, CP at 326; that he had abused her, that the police reports were all wrong; etc. But all of this had been dealt with during the divorce, when her own attorney, Mr. Gibson, had done all the discovery he felt was warranted. RP at 10-11.

(2) The risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards. There was very little risk of erroneous deprivation of the community assets. Both attorneys – the LGAL and Landon Gibson III, Ms. Lane’s attorney – had done the discovery that they felt was needed.

Ms. Lane has no constitutional (or other) right to go to trial over assets that even her own attorney did not feel were real. There is no “right to trial” for frivolous claims. There is no “right” to harass or assault her husband.

The assets and maintenance were dealt with. She was not deprived of them. She did end up with less than she felt was her share. (Though from Ms. Lane’s Declaration, it is hard to tell if anything would have been “fair” to her.

The procedural safeguards in this case were three: (1) Ms. Lane had her own attorney, whose job it was to advocate for what she wanted. (Which he had.) (2) The LGAL was appointed to look out for her interests. (3) The trial court had to approve the settlement.

There was little probable value to allowing Ms. Lane to go to trial. There was no indication from Ms. Gilliam or Mr. Gibson that Mr. Lane had taken and spent \$860,000 of her money. The money that had gone into their family home was accounted for, and she was getting her share of the community assets. There was no evidence that Mr. Lane had ever abused her; the numerous police reports, CP at 95-184, and the FCS reports, CP at 626; 634-652; 653-659, made it very unlikely that she was not mentally ill and dangerous. There was no evidence that the \$1200 per month in maintenance, given that Mr. Lane was paying all of the community debts, the cost of supervision for her; and the Suburban payment, was unfair. The court provided for an adjustment in the event she lost her SSI, as well. CP at 570. The probability that she would prove any of the things she really wanted to prove, was next to nil.

When weighing the probable value of allowing a trial, as well, the court has to weigh the probable evidence that Ms. Lane would present. And here is an insurmountable problem: she was mentally ill. There is no dispute that she has severe mental health issues. That means, for all practical purposes, her credibility and testimony is worthless. Her testifying would add no value at all.

(3) The governmental interest, including costs and administrative burdens of additional procedures.

The burden is substantial. Such a trial would be expensive. But Mathews makes clear the court may consider the costs and other

REPLY BRIEF OF RESPONDENT 16

burdens on the system in considering the appropriate “due process”. In a civil case, where there are only two private parties, and the issues are division of assets and maintenance in a divorce, the court should also consider the community interest, including the cost to the community estate, and the burden on the other side. (In a divorce, that would be the other spouse).

Here the burden is very high, much higher than the community can bear. Mr. Lane had been through a year of divorce already. Ms. Lane wanted, not just a trial, but a continuance of unspecified length, to go out and find the evidence that her own attorney did not think was worth pursuing. She wanted a continuance to redo the parenting evaluation. This would add many more months and many thousands of dollars, which she did not have. It would add many thousands of dollars to Mr. Lane’s attorney fees, which would only take away from his ability to support their son and pay the community debts. The burden of giving her a continuance and a trial, would be very, very high.

Under a Mathews analysis, the balance tilts heavily towards finding that the right to a trial outweighed by the other factors.

e. Washington Courts, In A Divorce, Have Never Found Trial Is A “Substantial Right” That Outweighs All Other Factors.

Though the courts are very careful when a critical personal liberty interest is implicated, Washington courts have never provided the property

division and award of maintenance in a divorce the same degree of due process protection.

In re Marriage of Gannon, 104 Wash.2d 121, 124, 702 P.2d 465, 467 (Wash.,1985), the court appointed a guardian for the wife, who then sought and settled a divorce action. The Gannon court held that in appropriate circumstances, a guardian could actually sue for dissolution. Gannon at 124. (Thus overruling Jones v. Minc, 77 Wash.2d 381, 462 P.2d 927 (1969)). Under Gannon, there is no inviolable right to a trial; the guardian has the authority to not only seek a divorce, but settle it.

Arguably, the right to get divorced is a more fundamental personal liberty interest than the division of property. If there is no due process violation in a guardian suing for divorce, there can be no due process violation in settling a divorce.

In Miller's Guardianship, 26 Wash.2d 202, 173 P.2d 538 (1946), the wife was insane. The court appointed a guardian ad litem to represent the wife, and, after a report by the GAL and a hearing (not a trial), entered orders which awarded all of the property to the husband, with the proviso that the award would be revisited if the wife ever became sane. Miller's Guardianship at 203. The court found that the GAL had authority to commence or prosecute a suit. Miller's Guardianship at 207. The court

specifically found that the appointment of a guardian ad litem properly protected her interests. Miller's Guardianship at 207. There was no due process violation. Miller's Guardianship has never been overruled, and was been followed in Dill. Dill at 150.

The courts have declined to find there is a hard-and-fast due process right to trial in other family law contexts as well. Under RCW 26.50.060, the court may issue an Order of Protection for a year, RCW 26.50.060 or permanently, RCW 26.50.060. There is no right to a trial for the imposition of either of these, even though these severely impact both a liberty interest and a property interest. Arguably, because violation of a DVPO is aa crime, the liberty interest is considerably more critical than the division of assets and maintenance is a divorce.

Gourley v. Gourley, 158 Wash.2d 460, 145 P.3d 1185 (Wash.,2006), a Protection Order case, deals with the due process issue. The Gourley court applied the balancing test in Mathews, and stated that Due process is a flexible concept in which varying situations can demand differing levels of procedural protection. Gourley at 467, citing Mathews v. Eldridge, at 334, 96 S.Ct. 893. Gourley went on to find that the procedures in RCW 26.50.060, which included notice and a hearing on affidavits, but not a

trial, was sufficient procedurally to meet due process requirements.

Gourley at 467-470.

There is no Washington case that holds that, the divorce context, division of property and maintenance is so fundamental, or important, a property interest, that there is a “right to trial” that trumps all other factors.

Ms. Lane, essentially, argues that “due process” means that a GAL cannot settle a case, without her informed agreement. She argues an absolutist, black and white position. In her view, there is no balancing test; there are no gradations of liberty interests; there is only her right to a trial, no matter what.

But a GAL is appointed in a divorce (or any lawsuit), under RCW 4.08.060, precisely because the party is incapacitated and cannot participate (including making decisions) in any meaningful way. As well, as in this case, Ms. Lane has a demonstrated desire to fight, period, no matter how delusional the issue, or how costly the fight. Doing what a mentally ill person demands, by itself, is rarely, if ever, in their best interest.

Under Ms. Lane’s argument, a GAL could never settle a case. No party would ever agree to a settlement in a divorce, if its enforceability was solely dependent on the whim of their mentally ill

spouse. This makes no sense at all, and has no support in statute or case law.

f. The LGAL Had Authority To Enter Into A CR 2A Agreement.

Appellant argues that the LGAL did not have authority to settle the case. This is not correct. Washington law is quite clear that a guardian has full and complete power to represent the ward in those things necessary to the prosecution or defense of a suit in which the ward is interested. Rupe v. Robinson, 139 Wash. 592, 595, 247 P. 954 (1926). The GAL has complete authority to represent the interests of the ward. Welfare of Dill, 60 Wash.2d 148, 150, 372 P.2d 541 (1962), citing Rupe at 595; Miller's Guardianship, 26 Wash.2d 202, 173 P.2d 538 (1946).

Other states have found much the same. California, in Golin v. Allenby, 90 Cal. App. 4th 616, 643, 118 Cal.Rptr.3d 762 (California 2010), found that the role of a guardian ad litem is, among other things, to protect the incompetent's rights in an action; to control the litigation; to compromise or settle; to direct the procedural steps. Golin at 643. The GAL's decisions are always subject to the court's supervisory authority to rescind or modify the actions taken. Golin at 643.

Similarly, the California court in Marriage of Caballero, 27 Cal.App. 4th 1139 (California 1994), found that "The guardian may

make tactical and even fundamental decisions affecting the litigation, but always with the interest of the guardian's charge in mind. Specifically, the guardian may not compromise fundamental rights, including the right to trial, without some countervailing and significant benefit." Caballero at 1150.

There was no requirement that an LGAL get the disabled party's agreement for a CR 2A agreement. The essence of an LGAL appointment is that a party is so disabled that she cannot meaningfully make decisions or participate in her case. In this case, it was very clear that Ms. Lane did not fully understand or comprehend the facts (which was why Ms. Gilliam was appointed in the first place), and she was incapable of agreeing.

Appellant cites Howard v. Dimaggio, 70 Wash.App. 734, 855 P.2d 335 (1993) for the proposition that this CR 2A is unenforceable. That is not correct. Dimaggio is a case where the attorneys settled the case between them. The agreement was expressly contingent on the client's approval on various terms and conditions – which the client did not approve. The Court of Appeals ruled there had been no written agreement; hence it could not be enforced. Here there was a written agreement. And of course, in Dimaggio, both parties were competent. In this case, the LGAL clearly had authority to settle the case; since Ms. Lane was not competent, there was no requirement to get her approval.

Ms. Lane did not have to authorize Ms. Gilliam to settle the case. Ms. Lane never “authorized” or agreed for Ms. Gilliam to do anything at all. The court appointed her, with full statutory authority to settle claims. That is a verity in this case.

g. A Valid CR 2A Agreement Acts To Bar Ms. Lane’s Right To A Trial. A valid CR 2A Agreement acts to bar a party’s right to a trial. Obviously, if there is a valid CR 2A, then there is an agreement, and nothing with which a trial can deal. In order to have a trial, the party must set the CR 2A aside.

In order to set a CR2A Agreement aside, a party must show that there is a *genuine* dispute regarding the existence or material terms of the agreement. [Emphasis added.] A litigant’s second thoughts or remorse about the agreement are not sufficient. Lavigne v. Green, 106 Wash.App. 12, 19, 23 P.3d 515 (2001), citing to Marriage of Ferree, 71 Wash.App 35, 40, 856 P2d 706 (1993).

Nowhere in Lavigne is there any concern that a settlement agreement, properly entered into in compliance with CR 2A, violates a party’s due process right to a trial. In fact, holding that a CR 2A agreement violates due process, would vitiate the rule entirely. The whole purpose of CR 2A is to settle cases, and to hold that a party may demand a trial, regardless of a signed CR 2A, would mean CR 2A’s are worthless. No court in Washington (or any Federal court) has held this.

Here, the CR 2A deals with all of the issues: division of assets and liabilities; maintenance; parenting plan, child support, and ongoing protection orders. There was no dispute about the existence or material terms.

It is certainly true that Ms. Lane objected. But the rule is that there must be a genuine dispute. Here Ms. Lane disputed it on the basis that she was not mentally ill. But that had already been decided, when the court appointed the LGAL, and was not appealed. Her mental illness – and the delusional grip on reality that went along with it – are verities here. Her own attorney, and Ms. Gilliam, had investigated those claims to their satisfaction. The divorce had been going on for a number of months, and all assets had been dealt with in mediation. Claims, in and of themselves, by a mentally ill person, without evidence, and especially where two very competent attorneys had found no evidence to back up her claims, are not a basis to invalidate a CR 2A.

h. The LGAL Acted Properly In The Case. Obviously Mr. Lane has little direct knowledge of how Ms. Gilliam dealt with the case and with Ms. Lane.

It is certainly true that Ms. Gilliam had the duty to act in her client's best interests, as laid out in Guardianship of Matthews, 156 Wash.App. 201, 232 P.3d 1140 (2010) and the Guardianship Rules. But that does not mean an LGAL does what her client wants her to do. An

LGAL – or any attorney – is not required to do pointless things, or pursue frivolous litigation or discovery, if in her judgment it is a bad or pointless idea. Nowhere in Matthews or the GALR is there a requirement to make the client happy.

There is a requirement to talk to the client. But Ms. Gilliam did talk to Ms. Lane, at length, on the phone. There is nothing that requires an in person meeting with the incapacitated person. Here Ms. Gilliam discussed Ms. Lane’s difficulties with her attorney, Mr. Gibson, and together they decided an in-person meeting was unlikely to add any value.

GALR 2(a) recognizes this when it states:

(a) Represent best interests. A guardian ad litem shall represent the best interests of the person for whom he or she is appointed. Representation of best interests may be inconsistent with the wishes of the person whose interest the guardian ad litem represents. The guardian ad litem shall not advocate on behalf of or advise any party so as to create in the mind of a reasonable person the appearance of representing that party as an attorney.

GALR 2(a)

Ms. Lane argues that Ms. Gilliam was negligent in not pursuing the assets she was sure existed. But the extent of discovery is up the judgment of the attorney in the case. Here there were two attorneys, both working on Ms. Lane’s behalf. Both of them clearly felt discovery of the kind Ms. Lane wanted – and wants - was pointless.

In fact, under the RPC's, the LGAL, as an attorney, has a duty NOT to engage in frivolous litigation. RPC 3.1 and RPC 8.4(d);In Re Disciplinary Proceedings Against Jones, 338 P.3d 842 (2014).

The court, in the reasonableness hearing, discussed the assets and the discovery Mr. Gibson and Ms. Gilliam had pursued. The court was evidently satisfied. Mr. Gibson was clear in stating that the "assets" Ms. Lane wanted to pursue, did not exist. If her own attorney did not think there was any point to pursuing the assets Ms. Lane claimed, and he worked for her, it was surely reasonable for the trial court to accept that and enforce the agreement.

Entering into a settlement agreement had substantial benefits to Ms. Lane. A trial was unlikely to show any new assets. It was going to be costly: because Ms. Lane desperately wanted custody of their son, it was likely to take several days and cost \$10,000-20,000.

It was unlikely to result in any parenting plan other than supervised visitation. The FCS reports were clear: she was a risk to Mr. Lane and to their son. Ms. Lane's separate assets were limited. According to her own attorney, she had about \$50,000 in assets at the beginning of the divorce. Those had been depleted, due to attorney fees and the LGAL fees, by the time of the hearing, to about \$10,000. RP at 13. There was no money for another round of extended litigation, purely to allow Ms. Lane to seek to prove her fantasies.

The community assets – and all the remaining assets were community – were divided 55/% to husband, 45% to wife. A trial might have given her more; but given that she was not paying child support, and Mr. Lane was paying the supervisor for visitation, it might not.

Similarly, she may well have not gotten more maintenance. Though disabled, she risked losing her disability if she was awarded more maintenance. Mr. Lane was getting no child support. He was paying for the parenting supervisor so she could see their son. He was taking on all of the community bills.

i. Allowing The Case To Proceed Would Have Impacted Mr. Lane’s Due Process Rights. Part of due process is the requirement to have a fair trial. It is difficult to see how allowing Ms. Lane to try claims which were pretty clearly would have been fair to Mr. Lane. There is no due process right to go to trial over delusional claims.

There was substantial evidence that Ms. Lane was delusional, and wanted things – reconciliation with Mr. Lane; dropping the DVPO; reimbursement for \$806,943 she claimed Mr. Lane had stolen from her – that were simply delusional. Mr. Lane had settled the case; under due process he was entitled to rely on the CR 2A agreement he had signed.

Under Mathews, the burden on Mr. Lane is a part of the due process analysis. Mathews at 335. Mr. Lane does have a due process right to get the divorce resolved in some reasonably efficient – and quick – manner. The case had taken almost a year. Ms. Lane, in effect,

had two attorneys on her side – Mr. Gibson, representing her directly, and Ms. Gilliam, representing her interests. Both had the right and ability to do discovery, etc.

In her argument at the reasonableness hearing, Mr. Gibson – arguing Ms. Lane’s position – told the court what she really wanted. And Ms. Lane, when she addressed the court, told the court more. It was NOT just a trial. She did not say that we wanted a trial that day. She really wanted a continuance to have the fight. wanted to track down the assets that she thought existed. RP at 5. She really, really wanted to do much more discovery. RP at 5. She was convinced that Mr. Lane had hidden up to \$3 million in assets that she had a share of. RP at 6. She wanted another crack at convincing FCS that she was a good mother. RP at 7.

None of this could be done in the weeks remaining before the trial date. The only way to accomplish this would have been to continue the trial date for another 6-8 months, at double the time and cost that the divorce had cost Mr. Lane to that point. Mr. Lane does have a right to get the divorce done in a reasonable time period.

On the other hand, Ms. Lane has no due process right to unlimited discovery, or unlimited time to do discovery, where she already had a year and could not prove any.

i. The Trial Court Was Correct In Approving The Settlement. Ms. Lane was present for the reasonableness hearing, and told the court what she thought of it.

More importantly, was whether the court properly considered whether the agreement was reasonable. The Washington rules are clear:

A trial court's decision to enforce a binding agreement under CR 2A is reviewed for an abuse of discretion. Patterson at 586. A trial court's determination that the parties fully appreciated the terms of the settlement will not be disturbed where it is supported by the evidence. Snyder at 173–174. Courts are inclined to view stipulated settlements as final. Snyder at 173. A judgment by consent will not be reviewed on appeal absent fraud, mistake, or want of jurisdiction. Wash. Asphalt Co. v. Harold Kaeser Co., at 91.

The court found the settlement was reasonable. Ms. Lane was getting \$1200 per month in maintenance, for 5 years. RP at 16. CP at 553. Mr. Lane was paying for her Suburban. RP at 16; CP at 553. He was paying the entire cost of supervision, so that she could safely see her son. RP at 17. She could seek to modify maintenance in two years if she lost her SSI. RP at 18.

The court was correct in analyzing the due process issue. Settling a divorce, is quite different than terminating someone's parental rights. RP at 18.

Ms. Lane's request, at the motion for presentation, was for a lengthy continuance, so that she could do much more discovery, to find assets that did not exist. She needed a lengthy continuance so that she could try to find someone to help her with the FCS investigation, when she had failed to cooperate with FCS's three or four attempts to contact her. RP at 7. She needed a lengthy continuance so she could "prove" that Mr. Lane was the abuser, RP at 8, CP at 315, when the FCS reports and police reports were crystal clear. She wanted a continuance so she could prove his "perjury", CP at 312, and find his "true" assets. CP at 312.

Mr. Gibson stated that he and Ms. Gilliam had consulted about discovery. RP at 11. Discovery was actually his, not Ms. Gilliam's decision, and not doing more discovery was well within his discretion. RP at 11. There is no requirement for an attorney to take frivolous action, simply because an incapacitated clients wants to.

Attorney fees and the cost of litigation were a major factor. Mr. Gibson pointed out that originally Ms. Lane had about \$50,000 in her separate account, which Mr. Lane had safeguarded during the marriage, and then voluntarily turned over to Mr. Gibson. RP at 13. That had been depleted, and by the time of the hearing, between his fees and Ms. Gilliam's fees, there was only about \$10,000 left for Ms. Lane. RP at 13. There was very little other cash in the community. Mr. Lane didn't

have appreciable amounts of cash or liquid investments either. CP at 293-294.

Continuing the case, to allow for frivolous discovery, would not only drain what was left in Ms. Lane's account – leaving nothing for her – but further drain away the community assets she was supposed to get. This was a fundamental benefit to her, which warranted enforcing the CR 2A.

There was no evidence that Ms. Gilliam – or the court – did not “properly” consider the effect that a dissolution settlement might – or might not – have on Ms. Lane's SSI benefits. Mr. Gibson's concern, at RP 11, was that she might be getting so much, that it might disqualify her for SSI; and then it would not be enough to support her. To the extent that was a potential problem, the court dealt with it, by making the maintenance modifiable. This is a moot issue.

There was ample evidence that Ms. Gilliam investigated Ms. Lane's allegations to the extent that she and/or Mr. Gibson thought necessary. She worked closely with Mr. Gibson, who was in constant contact with Ms. Lane.

Mr. Gibson was the attorney actually working for Ms. Lane. If anyone had the duty to do investigate her claims, it was his primary duty to do that. Interrogatories were sent out and answered.

The fact that her own attorney – that she was paying to fight – had not, by the end of the divorce, found any of the millions Mr. Lane
REPLY BRIEF OF RESPONDENT 31

had supposedly hidden; had not “helped” her cooperate with FCS and prove Mr. Lane was the abuser; or any of her other claims she makes in this appeal, is pretty good evidence that the claims were delusional.

(We should note that we are NOT saying Mr. Gibson did anything incorrectly. Both he and Ms. Gilliam were professional and ethical throughout the divorce. But it is undeniable that in terms of proving her case to Ms. Gilliam, it is Mr. Gibson’s job, as her attorney, primarily to do the work. But there was no proof of any of her claims; and routine discovery made that clear. It was clear early on what the assets actually were. Her separate assets were easily traced, and it turned out Mr. Lane was actually safeguarding them. In Mr. Lane’s opinion, spending money and time trying to prove what Ms. Lane badly wanted to prove, would have been frivolous and would have exposed Ms. Lane to substantial attorney fees as a sanction.)

V. CONCLUSION

At the end of the day, this really about a mentally ill party not liking a settlement. Ms. Lane deeply, obsessively, wants to “prove” that Mr. Lane has hidden a great deal of money; that he is abusive and she should have custody; and other things. The case settled, on reasonable terms, with a valid CR 2A. The agreement would have been reasonable, if Ms. Lane had been sane, and she had signed it. There was no real dispute about the terms or the facts in the case (except in Ms. Lane’s mind).

The real question is, did the LGAL have the authority to compromise claims and settle the case? If she did, then she had authority to enter into a binding CR 2A agreement. The essence of appointing an LGAL is not to give Ms. Lane advice. That is what Mr. Gibson was for. The LGAL is appointed to act in her best interest.

That is necessarily sometimes contrary to what the disabled party wants. It certainly was in this case: Ms. Lane wanted – and still wants – to gain custody; to prove Mr. Lane has, somewhere, \$3 million that he is hiding; to prove that he abused her; to prove that he committed perjury. RP at 20-28.

Settling the case, on these terms, was an appropriate exercise of her authority. The trial court was correct in finding that and in entering final orders consistent with the CR 2A.

We would ask the court to deny the appeal and award the father attorney fees under RAP 18.1.

RESPECTFULLY SUBMITTED this 20 day of December, 2014.



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Lane v. Lane

Appendix - Foreign Case Law

App. No.	Description
1	<u>Callie v. Near</u> , 829 F.2d 888, 890 (9 th Circ. 1987)
2	<u>Mathews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)
3	<u>Golin v. Allenby</u> , 90 Cal. App. 4 th 616, 643, 118 Cal.Rptr.3d 762 (California 2010)
4	<u>Marriage of Caballero</u> , 27 Cal.App. 4 th 1139 (California 1994)

Exhibit 1

829 F.2d 888

United States Court of Appeals,
Ninth Circuit.

Albert S. CALLIE and Joyce
M. Callie, Plaintiffs-Appellees,

v.

Bradley A. NEAR; Elizabeth R. Near; Reddington
Investments, Inc.; and Ruidoso Holiday
Limited Partnership, Defendants-Appellants.

No. 86-2880. | Argued and Submitted
June 11, 1987. | Decided Oct. 7, 1987.

Real estate investors brought action against general partners in two limited partnerships for alleged fraud and breach of fiduciary duties in violation of federal and state securities laws and Arizona common law. The parties began negotiating full and final settlement of issues. Upon plaintiffs' motion to enter judgment under purported settlement, the District Court for the District of Arizona, Alfredo C. Marquez, J., entered judgment for \$387,000 against defendants. Defendants appealed. The Court of Appeals, Choy, Senior Circuit Judge, held that District Court's failure to conduct evidentiary hearing before summarily enforcing settlement agreement was error in light of questions as to parties' intent to be bound upon execution of written, signed agreement, and (2) existence of conflicting evidence on precise method for securing payment of settlement made summary enforcement inappropriate.

Reversed and remanded.

West Headnotes (5)

[1] **Compromise and Settlement**



Although district court has equitable power to summarily enforce settlement agreements, parties have to be allowed evidentiary hearing where material facts concerning existence or terms of agreement to settle are in dispute.

188 Cases that cite this headnote

[2] **Compromise and Settlement**



for Jury

Whether parties intended only to be bound by settlement agreement upon execution of written, signed agreement is factual issue.

30 Cases that cite this headnote

Questions

[3] **Compromise and Settlement**



District court was required to conduct evidentiary hearing regarding intent of parties where no written, signed agreement had been executed, and one party to alleged settlement claimed that parties' intent only to be bound upon execution of written, signed agreement was set forth in correspondence between parties.

47 Cases that cite this headnote

Enforcement

[4] **Compromise and Settlement**



Existence of conflicting evidence on issue of precise method for securing payment of settlement and on theory of liability on which judgment would be based made summary enforcement of settlement through weighing of affidavits and reliance on unsworn statements of counsel inappropriate.

Cases that cite this headnote

Enforcement

[5] **Compromise and Settlement**



Enforcement

District court's failure to conduct evidentiary hearing regarding material terms of purported settlement agreement could not be justified on grounds that district court had entered judgment which did not specify basis of judgment in light of lack of meeting of minds on basis of judgment which made summary enforcement of settlement inappropriate.

Enforcement

83 Cases that cite this headnote

Attorneys and Law Firms

*889 Lindsay Brew, Tucson, Ariz., for plaintiffs-appellees.

Anthony P. Marquez, El Paso, Tex., for defendants-appellants.

Appeal from the United States District Court for the District of Arizona.

Before CHOY, Senior Circuit Judge, TANG, Circuit Judge, and STEPHENS,* Senior District Judge.

Opinion

CHOY, Senior Circuit Judge:

Elizabeth and Bradley Near (the "Nears") and Reddington Investment, Inc. ("Reddington") appeal the district court's decision to enforce a purported settlement agreement without first holding an evidentiary hearing to determine the existence and terms of the agreement. We reverse and remand.

BACKGROUND

On August 31, 1984, Joyce and Albert Callie (the "Callies") filed suit in the district court against, inter alia, the Nears and Reddington (the "appellants").¹ The action arose out of the Callies' investments in two limited partnerships: Reddington Investment Limited Partnership I ("RILP-I") and Ruidoso Holiday Limited Partnership ("RHLP"). Bradley Near and Reddington were the sole general partners of RILP-I, and Bradley Near was a general partner of RHLP. The Callies sought to recover damages for alleged fraud and breach of fiduciary duties in violation of federal and state securities laws and Arizona common law.

In the meantime, the parties, acting through their counsel, began negotiating a full and final settlement. The primary issues in the negotiations involved determination of: 1) the amount of a monetary settlement, 2) the payment schedule, and 3) the method for securing payment.

In June 1986, counsel expressed the willingness of the parties to settle for \$252,500. On June 9, 1986, the appellants'

counsel wrote to the Callies' counsel "to confirm" the terms of the settlement. The letter contained the following pertinent provisions:

1. Brad Near will pay to Albert Callie the sum of \$252,500 in complete settlement....

2. Payment of the above-referenced sum shall be made in installments as follows:

(A) A payment of \$52,500 on or before June 30, 1986;

(B) \$50,000 on or before September 30, 1986, with a grace period of thirty (30) days;

(C) \$50,000 on or before March 30, 1987, with a grace period of thirty (30) days;

(D) \$50,000 on or before June 30, 1987, with a grace period of thirty (30) days; and

(E) \$50,000 on or before December 30, 1987, with a grace period of thirty (30) days.

3. Brad Near will sign a judgment in the sum of \$387,000 [to secure the timely payments of the installments], which judgment will not be lodged or filed with the Court, but will remain in your control and custody and its terms and conditions ... will remain confidential.

*890 4. A judgment may be filed with the Court only upon Brad Near's failure to comply with the aforementioned payment schedule.

On June 10, 1986, counsel for the Callies forwarded a proposed stipulation and judgment to the appellants' counsel. The proposed judgment provided in pertinent part:

[The Nears, Reddington, and RHLP] and each of them in connection with the sale of a security in the State of Arizona have engaged in conduct or a course of business which did result in a *fraud* or *deceit* upon the [Callies] as prohibited by Arizona Revised Statutes §§ 44-1991 and 44-1995;

(Emphasis added.). The appellants declined to execute the proposed stipulation and judgment. They contended that the proposed judgment was unacceptable because it was based on state security and racketeering violations.

On July 7, 1986, counsel for the Callies demanded the first installment payment, which had been due on June 30, 1986, pursuant to Paragraph 2 of the June 9th letter. The appellants refused payment. On July 10, 1986, the Callies filed a motion with the district court to enter a judgment against the appellants for \$387,000 pursuant to Paragraphs 3 and 4 of the June 9th letter. In response to the motion, the appellants contended that no settlement agreement was ever reached. In the alternative, they requested an evidentiary hearing, contending that two material factual issues regarding the validity and scope of the settlement agreement were in dispute.

The district judge heard arguments on the Motion for Entry of Judgment, but did not hold an evidentiary hearing. On October 21, 1986, after receiving affidavits from counsel but without any further hearing, the district court entered judgment for \$387,000 against the appellants. The judgment made no reference to the state security and racketeering violations which the appellants had found objectionable.

This appeal followed.

DISCUSSION

The appellants contend, inter alia, that the district court erred in failing to conduct an evidentiary hearing before determining that a settlement agreement had been made. We review the district court's enforcement of a settlement agreement for abuse of discretion. See *Russell v. Puget Sound Tug & Barge Co.*, 737 F.2d 1510, 1511 (9th Cir.1984).

[1] It is well settled that a district court has the equitable power to enforce summarily an agreement to settle a case pending before it. *E.g.*, *Mid-South Towing Co. v. Har-Win, Inc.*, 733 F.2d 386, 389 (5th Cir.1984); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976); *Autera v. Robinson*, 419 F.2d 1197, 1200 (D.C.Cir.1969). However, the district court may enforce only *complete* settlement agreements. *Ozyagcilar v. Davis*, 701 F.2d 306, 308 (4th Cir.1983); see *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1189 (8th Cir.1984). Where material facts concerning the *existence* or *terms* of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing. See *Russell*, 737 F.2d at 1511; *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621 (6th Cir.1973).

In the instant case, the district court abused its discretion by not conducting an evidentiary hearing. The appellants raised two factual issues which were material for determining the validity and scope of the settlement agreement.

I. Intent of the Parties

First, the appellants contended below that the settlement agreement was contingent upon the execution of a stipulation and judgment. Because no such execution occurred, the appellants argued that they had raised a substantial factual issue regarding the validity of the settlement agreement which must be resolved in an evidentiary hearing. This contention has merit.

[2] [3] Whether the parties *intended* only to be bound upon the execution of a *891 written, signed agreement is a factual issue. See *Ozyagcilar*, 701 F.2d at 308 n. *; *Pyle v. Wolf Corp.*, 354 F.Supp. 346, 352-53 (D.Or.1972). During the arguments on the Motion for Entry of Judgment, the district judge observed that there was no "indication that [the June 9th letter] was subject to the preparation of any documents." However, circumstances of the settlement negotiations could defeat such a conclusion. See *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir.1981); *Pyle*, 354 F.Supp. at 353; *Britt v. Thorsen*, 258 Or. 135, 481 P.2d 352, 354 (1971). In fact, in their brief opposing the Callies' Motion for Entry of Judgment, the appellants alleged that the parties' intent only to be bound upon the execution of a written, signed agreement was set forth in the correspondence between the parties. Although the district court acknowledged this problem of intent during the arguments on the Motion for Entry of Judgment, the arguments did not clarify this issue. Accordingly, the district court erred in failing to conduct an evidentiary hearing regarding the intent of the parties.

II. Basis of Judgment

[4] In addition to the intent of the parties to bind themselves, the formation of a settlement contract requires agreement on its *material terms*. The appellants contended below that the parties never had a meeting of the minds regarding the precise method for securing payment of the settlement. The existence of conflicting evidence on this issue makes summary enforcement inappropriate.

Specifically, the appellants acknowledged that they were willing to settle for \$252,500 and that Bradley Near would sign a judgment for \$387,000 to secure the payment of the settlement. However, the appellants contended that the parties failed to agree on the theory of liability upon which the judgment would be based. According to the appellants, the basis of the judgment was an important focus of the negotiations. Any mention of fraud in the judgment would jeopardize the appellants' business (syndicated real estate limited partnerships) because it is subject to rigid securities regulations. Counsel for the appellants indicated that a securities counsel for the appellants who was involved in the settlement negotiations could be called to clarify this issue. Because the appellants presented allegations which, if true, would indicate that there was no meeting of minds sufficient to effect a settlement agreement, the district court could not properly resolve this factual dispute merely by weighing the affidavits and relying on the unsworn statements of counsel. See *Mid-South Towing*, 733 F.2d at 391; *Ozyagcilar*, 701 F.2d at 308 n. *; *Massachusetts Casualty Insurance Co. v. Forman*, 469 F.2d 259, 260-61 (5th Cir.1972) (per curiam).

[5] The failure of the district court to conduct an evidentiary hearing regarding the material terms of the purported settlement agreement cannot be justified, as suggested by the Callies, on the ground that the district court had entered a

judgment which did not specify the basis of the judgment. True, this "process" presumably alleviated the disagreement between the parties regarding the theory of liability upon which the judgment would be based. However, alleviation of a disagreement does not erase the fact that the parties never had a meeting of the minds regarding the precise method for securing payment of the settlement. See *Main Line Theatres, Inc. v. Paramount Film Distributing Corp.*, 298 F.2d 801, 803 (3d Cir.), cert. denied, 370 U.S. 939, 82 S.Ct. 1585, 8 L.Ed.2d 807 (1962). As mentioned earlier, the district court only has the power to enforce *complete* settlement agreements. *Ozyagcilar*, 701 F.2d at 308; see *Gardiner*, 747 F.2d at 1189. Accordingly, the district court erred in failing to conduct an evidentiary hearing on the disputed terms of the settlement agreement.²

*892 CONCLUSION

The judgment of the district court is VACATED and the case REMANDED for an evidentiary hearing on the existence and terms of the purported settlement agreement.

Parallel Citations

Fed. Sec. L. Rep. P 93,409

Footnotes

- * Honorable Albert Lee Stephens, Jr., Senior United States District Judge, Central District of California, sitting by designation.
- 1 The Nears were the sole shareholders, directors, and officers of Reddington.
- 2 The appellants also argue that, assuming the existence of a binding settlement agreement, the district court nevertheless erred in entering a judgment against Reddington. According to the appellants, Paragraph 3 of the June 9th letter expressly provided that only Brad Near would sign a judgment. We do not reach this issue. An evidentiary hearing should first be held to determine whether a settlement agreement in fact exists.

Exhibit 2

96 S.Ct. 893

Supreme Court of the United States

F. David MATHEWS, Secretary of Health,
Education, and Welfare, Petitioner,

v.

George H. ELDRIDGE.

No. 74-204. | Argued Oct. 6,
1975. | Decided Feb. 24, 1976.

A person whose social security disability benefits had been terminated brought an action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education and Welfare for assessing whether there exists a continuing disability. The United States District Court for the Western District of Virginia, 361 F.Supp. 520, determined that the administrative procedures in question were unconstitutional, and the Court of Appeals, 493 F.2d 1230, affirmed. On grant of certiorari, the Supreme Court, Mr. Justice Powell, held that an evidentiary hearing is not required prior to termination of disability benefits, and that the present administrative procedures for such termination fully comport with due process.

Reversed.

Mr. Justice Brennan dissented and filed opinion in which Mr. Justice Marshall concurred.

West Headnotes (11)

[1] Social Security



of other remedies

Despite disability benefit claimant's failure to exhaust administrative remedies under Social Security Act after termination of disability benefits, district court had jurisdiction to entertain his claim that evidentiary hearing was required prior to termination of such benefits where claimant's answers to questionnaire and letter to state agencies specifically presented claim that his benefits should not be terminated because he was still disabled and

Exhaustion

where claimant's interest in having particular issue promptly resolved was so great that deference to decision of Secretary of Health, Education and Welfare whether to waive exhaustion requirements was inappropriate. Social Security Act, § 205(a, g, h) as amended 42 U.S.C.A. § 405(a, g, h); Fed.Rules Civ.Proc. rules 8(c), 12(h)(1). 28 U.S.C.A.; Social Security Administration Regulations, §§ 404.910, 404.916, 404.940, 42 U.S.C.A. App.; 28 U.S.C.A. §§ 1257, 1291.

1266 Cases that cite this headnote

[2] Social Security



of other remedies

Secretary of Health, Education and Welfare may waive requirement that administrative remedies be exhausted before court review of agency determination is sought if Secretary satisfies himself, at any stage of administrative process, that no further review is warranted either because internal needs of agency are fulfilled or because relief that is sought is beyond his power to confer. Social Security Act, § 205(g) as amended 42 U.S.C.A. § 405(g).

Exhaustion

585 Cases that cite this headnote

[3] Constitutional Law



Security

Interest by individual in continued receipt of social security benefits is statutorily-created property interest protected by due process clause of Fifth Amendment. Social Security Act, § 201 et seq. as amended 42 U.S.C.A. § 401 et seq.; U.S.C.A.Const. Amend. 5.

Social

520 Cases that cite this headnote

[4] Constitutional Law



and Hearing

Notice

Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. U.S.C.A.Const. Amends. 5, 14.

2248 Cases that cite this headnote

[5] Constitutional Law



considered; flexibility and balancing

Due process is not technical conception with fixed content unrelated to time, place and circumstances; rather, it is flexible and calls for such procedural protections as particular situation demands. U.S.C.A.Const. Amends. 5, 14.

1181 Cases that cite this headnote

[6] Constitutional Law



considered; flexibility and balancing

Identification of specific dictates of due process generally requires consideration of three distinct factors: private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. U.S.C.A.Const. Amends. 5, 14.

5348 Cases that cite this headnote

[7] Constitutional Law



benefits

Evidentiary hearing is not required prior to termination of social security disability benefits; present administrative procedures for such terminations fully comport with due process. U.S.C.A.Const. Amends. 5, 14; Social Security Act, §§ 201(b), 202(b-d), 204, 204(b), 205(a,

g, h), 215, 216(i)(2)(D), 221, 221(b, c), 223, 223(a)(1, 2), (d)(1), (d)(1)(A), (d)(2)(A), (d)(3), 224, 1614(a)(3), 1631(c) as amended 42 U.S.C.A. §§ 401 et seq., 401(b), 402(b-d), 404, 404(b) 405(a, g, h), 415, 416(i)(2)(D), 421, 421(b, c), 423, 423(a)(1, 2), (d)(1), (d)(1)(A), (d)(2)(A), (d)(3), 424a, 1382c(a)(3), 1383(c); Social Security Administration Regulations, §§ 404.408, 404.501-404.515, 404.503, 404.504, 404.907, 404.909, 404.910, 404.916, 404.917, 404.927, 404.934, 404.940, 404.945, 404.951, 42 U.S.C.A. App.; 28 U.S.C.A. §§ 1257, 1291, 1361.

324 Cases that cite this headnote

[8] Constitutional Law



Agencies and Proceedings in General

Degree of potential deprivation that may be created by particular decision is factor to be considered in assessing validity of administrative decision-making process from due process standpoint. U.S.C.A.Const. Amends. 5, 14.

32 Cases that cite this headnote

[9] Constitutional Law



considered; flexibility and balancing

Procedural due process rules are shaped by risk of error inherent in truth-finding process as applied to generality of cases, not rare exceptions. U.S.C.A.Const. Amends. 5, 14.

335 Cases that cite this headnote

[10] Constitutional Law



Disability

Agencies and Proceedings in General

Financial cost alone is not controlling weight in determining whether due process requires particular procedural safeguard prior to some administrative decision; but government's interest, and hence that of public, in conserving scarce fiscal and administrative resources, is

Administrative

Factors

Administrative

factor which must be weighed. U.S.C.A.Const. Amends. 5, 14.

913 Cases that cite this headnote

[11] Constitutional Law



and Hearing

Essence of due process is requirement that person in jeopardy of serious loss be given notice of case against him and opportunity to meet it; all that is necessary is that procedure be tailored, in light of decision to be made, to capacities and circumstances of those who are to be heard, to insure that they are given meaningful opportunity to present their case. U.S.C.A.Const. Amends. 5, 14.

2541 Cases that cite this headnote

****895 *319 Syllabus***

In order to establish initial and continued entitlement to disability benefits under the Social Security Act (Act), a worker must demonstrate that, inter alia, he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . ." The worker bears the continuing burden of showing, by means of "medically acceptable . . . techniques" that his impairment is of such severity that he cannot perform his previous work or any other kind of gainful work. A state agency makes the continuing assessment of the worker's eligibility for benefits, obtaining information from the worker and his sources of medical treatment. The agency may arrange for an independent medical examination to resolve conflicting information. If the agency's tentative assessment of the beneficiary's condition differs from his own, the beneficiary is informed that his benefits may be terminated, is provided a summary of the evidence, and afforded an opportunity to review the agency's evidence. The state agency then makes a final determination, which is reviewed by the Social Security Administration (SSA). If the SSA accepts the agency determination it gives written notification to the beneficiary of the reasons for the decision and of his right to de novo state agency reconsideration. Upon acceptance by the SSA, benefits are terminated effective two months after

Notice

the month in which recovery is found to have occurred. If, after reconsideration by the state agency and SSA review, the decision remains adverse to the recipient, he is notified of his right to an evidentiary hearing before an SSA administrative law judge. If an adverse decision results, the recipient may request discretionary review by the SSA Appeals Council, and finally may obtain judicial review. If it is determined after benefits are terminated that the claimant's disability extended beyond the date of cessation initially established, he is entitled to retroactive payments. Retroactive adjustments are also made for overpayments. A few years after respondent was first awarded disability benefits he received and completed a questionnaire *320 from the monitoring state agency. After considering the information contained therein and obtaining reports from his doctor and an independent medical consultant, the agency wrote respondent that it had tentatively determined that his disability had ceased in May 1972 and advised him that he might request a reasonable time to furnish additional information. In a reply letter respondent disputed one characterization of his medical condition and indicated that the agency had enough evidence to establish his disability. The agency then made its final determination reaffirming its tentative decision. This determination was accepted by the SSA, which notified respondent in July that his benefits would end after that month and that he had a right to state agency reconsideration within six months. Instead of requesting such reconsideration respondent brought this action challenging the constitutionality of the procedures for terminating disability benefits and seeking reinstatement of benefits pending a hearing. The District Court, relying in part on Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, held that the termination procedures violated procedural due process and concluded that prior to termination of benefits respondent was entitled to an evidentiary hearing of the type provided welfare beneficiaries under Title IV of the Act. The Court of Appeals affirmed. Petitioner contends, inter alia, that the District Court is barred from considering respondent's action by Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522, which held that district courts are precluded from exercising jurisdiction over an action seeking a review of a decision of the Secretary of Health, Education, and Welfare regarding benefits under the Act except **896 as provided in 42 U.S.C. s 405(g), which grants jurisdiction only to review a "final" decision of the Secretary made after a hearing to which he was a party. Held :

1. The District Court had jurisdiction over respondent's constitutional claim, since the denial of his request for

benefits was a final decision with respect to that claim for purposes of s 405(g) jurisdiction. Pp. 898-902.

(a) The s 405(g) finality requirement consists of the waivable requirement that the administrative remedies prescribed by the Secretary be exhausted and the nonwaivable requirement that a claim for benefits shall have been presented to the Secretary. Respondent's answers to the questionnaire and his letter to the state agency specifically presented the claim that his benefits should not be terminated because he was still disabled, and thus satisfied the nonwaivable requirement. Pp. 899-901.

***321** (b) Although respondent concededly did not exhaust the Secretary's internal-review procedures and ordinarily only the Secretary has the power to waive exhaustion, this is a case where the claimant's interest in having a particular issue promptly resolved is so great that deference to the Secretary's judgment is inappropriate. The facts that respondent's constitutional challenge was collateral to his substantive claim of entitlement and that (contrary to the situation in *Salfi*) he colorably claimed that an erroneous termination would damage him in a way not compensable through retroactive payments warrant the conclusion that the denial of his claim to continued benefits was a sufficiently "final decision" with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Pp. 900-902.

2. An evidentiary hearing is not required prior to the termination of Social Security disability payments and the administrative procedures prescribed under the Act fully comport with due process. Pp. 901-910.

(a) "(D)ue process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484. Resolution of the issue here involving the constitutional sufficiency of administrative procedures prior to the initial termination of benefits and pending review, requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. Pp. 901-903.

(b) The private interest that will be adversely affected by an erroneous termination of benefits is likely to be less in

the case of a disabled worker than in the case of a welfare recipient, like the claimants in *Goldberg*, supra. Eligibility for disability payments is not based on financial need, and although hardship may be imposed upon the erroneously terminated disability recipient, his need is likely less than the welfare recipient. In view of other forms of government assistance available to the terminated disability recipient, there is less reason than in *Goldberg* to depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action. Pp. 905-907.

(c) The medical assessment of the worker's condition implicates ***322** a more sharply focused and easily documented decision than the typical determination of welfare entitlement. The decision whether to discontinue disability benefits will normally turn upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson v. Perales*, 402 U.S. 389, 404, 91 S.Ct. 1420, 1428-1429, 28 L.Ed.2d 842. In a disability situation the potential value of an evidentiary hearing is thus substantially less than in the welfare context. Pp. 907-908.

(d) Written submissions provide the disability recipient with an effective means of communicating his case to the decision-maker. The detailed questionnaire identifies ****897** with particularity the information relevant to the entitlement decision. Information critical to the decision is derived directly from medical sources. Finally, prior to termination of benefits, the disability recipient or his representative is afforded full access to the information relied on by the state agency, is provided the reasons underlying its tentative assessment, and is given an opportunity to submit additional arguments and evidence. Pp. 907, 908.

(e) Requiring an evidentiary hearing upon demand in all cases prior to the termination of disability benefits would entail fiscal and administrative burdens out of proportion to any countervailing benefits. The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances, and here where the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action but also assure a right to an evidentiary hearing as well as subsequent judicial review before the denial of his claim becomes final, there is no deprivation of procedural due process. Pp. 909-910.

493 F.2d 1230, reversed.

Attorneys and Law Firms

*323 Donald E. Earls, Norton, Va., for respondent.

Opinion

Mr. Justice POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

I

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. 70 Stat. 815, 42 U.S.C. s 423.¹ Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed *324 the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability.² The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration **898 (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity *325 of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability.³ 361 F.Supp. 520 (W.D.Va.1973). The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), which established a right to an "evidentiary hearing" prior to termination of welfare benefits.⁴ The Secretary contended that *Goldberg* was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural *326 due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in *Goldberg*. It further noted that decisions subsequent to *Goldberg* demonstrated that the due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities. See *Fuentes v. Shevin*, 407 U.S. 67, 88-89, 92 S.Ct. 1983, 1998-1999, 32 L.Ed.2d 556 (1972); *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971). Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. 361 F.Supp., at 528.⁵ Relying entirely upon the District Court's opinion, the Court of Appeals for the Fourth Circuit affirmed the injunction barring termination of Eldridge's benefits prior to an evidentiary hearing. 493 F.2d 1230 (1974).⁶ We reverse.

****899 II**

[1] At the outset we are confronted by a question as to whether the District Court had jurisdiction over this suit. The Secretary contends that our decision last Term in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), bars the District Court from considering Eldridge's action. Salfi was an action challenging the Social Security Act's *327 duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners. We there held that 42 U.S.C. s 405(h)⁷ precludes federal-question jurisdiction in an action challenging denial of claimed benefits. The only avenue for judicial review is 42 U.S.C. s 405(g), which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite.

Section 405(g) in part provides:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."⁸

*328 On its face s 405(g) thus bars judicial review of any denial of a claim of disability benefits until after a "final decision" by the Secretary after a "hearing." It is uncontested that Eldridge could have obtained full administrative review of the termination of his benefits, yet failed even to seek reconsideration of the initial determination. Since the Secretary has not "waived" the finality requirement as he had in *Salfi*, supra, at 767, 95 S.Ct., at 2467-2468, he concludes that Eldridge cannot properly invoke s 405(g) as a basis for jurisdiction. We disagree.

Salfi identified several conditions which must be satisfied in order to obtain judicial review under s 405(g). Of these, the requirement that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite grant of subject-matter jurisdiction . . ." 422 U.S., at 764, 95 S.Ct., at 2466.⁹ Implicit in *Salfi* however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed

by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

*329 **900 That this second requirement is an essential and distinct precondition for s 405(g) jurisdiction is evident from the different conclusions that we reached in *Salfi* with respect to the named appellees and the unnamed members of the class. As to the latter the complaint was found to be jurisdictionally deficient since it "contain(ed) no allegations that they have even filed an application with the Secretary . . ." 422 U.S., at 764, 95 S.Ct., at 2466. With respect to the named appellees, however, we concluded that the complaint was sufficient since it alleged that they had "fully presented their claims for benefits 'to their district Social Security Office and, upon denial, to the Regional Office for reconsideration.'" *Id.*, at 764-765, 95 S.Ct., at 2466. Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability had ceased, he specifically presented the claim that his benefits should not be terminated because he was still disabled. This claim was denied by the state agency and its decision was accepted by the SSA.

The fact that Eldridge failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling.¹⁰ As construed in *Salfi*, s 405(g) requires only that there be a "final decision" by the Secretary with respect to the claim of entitlement to benefits. Indeed, the named appellees in *Salfi* did not present their constitutional claim to the Secretary. *Weinberger v. Salfi*, O.T.1974, No. 74-214, App. 11, 17-21. The situation here is not identical to *Salfi*, for, while the *330 Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedures challenged here. 42 V.S.C. s 405(a). We do not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.

[2] As the nonwaivable jurisdictional element was satisfied, we next consider the waivable element. The question is whether the denial of Eldridge's claim to continued benefits was a sufficiently "final" decision with respect to his constitutional claim to satisfy the statutory exhaustion

requirement. Eldridge concedes that he did not exhaust the full set of internal-review procedures provided by the Secretary. See 20 CFR ss 404.910, 404.916, 404.940 (1975). As Salfi recognized, the Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond his power to confer. Salfi suggested that under s 405(g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the administrative program is his. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.

Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. Moreover, there *331 is a crucial distinction between the nature of the constitutional claim asserted here and that raised in Salfi. A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing. **901 See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 156, 95 S.Ct. 335, 365, 42 L.Ed.2d 320 (1974). In light of the Court's prior decisions, see, e. g., *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.¹¹ Thus, unlike the situation in Salfi, denying Eldridge's substantive *332 claim "for other reasons" or upholding it "under other provisions" at the post-termination stage, 422 U.S., at 762, 95 S.Ct., at 2465, would not answer his constitutional challenge.

We conclude that the denial of Eldridge's request for benefits constitutes a final decision for purposes of s 405(g) jurisdiction over his constitutional claim. We now proceed to the merits of that claim.¹²

III

A

[3] Procedural due process imposes constraints on governmental decisions which deprive individuals of

"liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, e. g., *Richardson v. Belcher*, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-257, 30 L.Ed.2d 231 (1971); *Richardson v. Perales*, 402 U.S. 389, 401-402, 91 S.Ct. 1420, 1427-1428, 28 L.Ed.2d 842 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372-1373, 4 L.Ed.2d 1435 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. *Arnett v. Kennedy*, 416 U.S. 134, 166, 94 S.Ct. 1633, 1650, 40 L.Ed.2d 15 (Powell, J., concurring in part) (1974); *Board of Regents v. Roth*, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 2708-2710, 33 L.Ed.2d 548 (1972); *Bell v. Burson*, 402 U.S., at 539, 91 S.Ct., at 1589; *Goldberg v. Kelly*, 397 U.S., at 261-262, 90 S.Ct., at 1016-1017. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process *333 that is constitutionally due before a recipient can be deprived of that interest.

**902 [4] This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). See, e. g. *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). See also *Dent v. West Virginia*, 129 U.S. 114, 124-125, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg v. Kelly*, 397 U.S., at 266-271, 90 S.Ct., at 1019-1022, 25 L.Ed.2d 287, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. *334 *SniaDachv. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), involving garnishment of wages, was entirely silent on the matter. In *Fuentes v. Shevin*, 407 U.S., at 96-97, 92 S.Ct., at 2002-2003, 32 L.Ed.2d 556, the Court said only that in a replevin suit between two private parties the initial determination required something more than an ex parte proceeding before a court clerk. Similarly, *Bell v. Burson*, supra, at 540, 91 S.Ct., at 1590, 29 L.Ed.2d 90, held, in the context of the revocation of a state-granted driver's license, that due process required only that the pre revocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). More recently, in *Arnett v. Kennedy*, supra, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U.S., at 142-146, 94 S.Ct., at 1638-1640.

[5] [6] These decisions underscore the truism that "(d)ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy*, supra, 416 U.S., at 167-168, 94 S.Ct., at 1650-1651 (Powell, J., concurring in part); *Goldberg v. Kelly*, supra, 397 U.S., at 263-266, 90 S.Ct., at 1018-1020; **903 *Cafeteria Workers v. McElroy*, supra, 367 U.S., at 895, 81 S.Ct., at 1748-1749. More precisely, our prior decisions *335 indicate that

identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., *Goldberg v. Kelly*, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

We turn first to a description of the procedures for the termination of Social Security disability benefits and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

B

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. 42 U.S.C. s 421(a).¹³ The standards applied and the procedures followed are prescribed by the Secretary, see s 421(b), who has delegated his responsibilities and powers under the Act to the SSA. See 40 Fed.Reg. 4473 (1975).

*336 In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable

"to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . ." 42 U.S.C. s 423(d)(1)(A).

To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," s 423(d)(3), that he has a physical or mental impairment of such severity that

"he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific

job vacancy exists for him, or whether he would be hired if he applied for work.” s 423(d)(2)(A).¹⁴

The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases.¹⁵

***337 **904** The continuing-eligibility investigation is made by a state agency acting through a “team” consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail in which case he is sent a detailed questionnaire or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM s 6705.1; Disability Insurance State Manual (DISM) s 353.3 (TL No. 137, Mar. 5, 1975).¹⁶

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM s 353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician.¹⁷ Ibid. Whenever the agency's tentative assessment of the beneficiary's condition differs from his ***338** own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file.¹⁸ He also may respond in writing and submit additional evidence. Id., s 353.6.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U.S.C. s 421(c); CM ss 6701(b), (c).¹⁹ If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency. 20 CFR ss 404.907, 404.909 (1975).²⁰ Upon acceptance by the SSA, benefits are terminated effective two months after the month in which

medical recovery is found to have occurred. 42 U.S.C. (Supp. III) s 423(a) (1970 ed., Supp. III).

339** If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR ss 404.917, 404.927 (1975). The hearing is nonadversary, *905** and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. s 404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, s 404.945, and finally may obtain judicial review. 42 U.S.C. s 405(g); 20 CFR s 404.951 (1975).²¹

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U.S.C. s 404. Cf. s 423(b); 20 CFR ss 404.501, 404.503, 404.504 (1975). If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U.S.C. s 404.²²

C

[7] Despite the elaborate character of the administrative procedures provided by the Secretary, the courts ***340** below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in *Goldberg*, see 397 U.S., at 263-264, 90 S.Ct., at 1018-1019, the nonprobationary federal employee in *Arnett*, see 416 U.S., at 146, 94 S.Ct., at 1640, 1641, and the wage earner in *Sniadach*. See 395 U.S., at 341-342, 89 S.Ct., at 1822-1823.²³

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

“The crucial factor in this context a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.” 397 U.S., at 264, 90 S.Ct., at 1018 (emphasis in original).

Eligibility for disability benefits, in contrast, is not based upon financial need.²⁴ Indeed, it is wholly unrelated to *341 the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards,²⁵ tort claims awards, savings, private **906 insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the “many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force” *Richardson v. Belcher*, 404 U.S., at 85-87, 92 S.Ct., at 259 (Douglas, J., dissenting). See Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9-10, 419-429 (1974) (hereinafter Staff Report).

[8] As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. Cf. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The potential deprivation here is generally likely to be less than in *Goldberg*, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be “unable to engage in substantial gainful activity.” 42 U.S.C. s 423; 361 F.Supp., at 523. Thus, in contrast to the discharged federal employee in *Arnett*, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

As we recognized last Term in *Fusari v. Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 540, 42 L.Ed.2d 521 (1975), “the possible length of wrongful deprivation of . . . benefits (also) is an important factor in assessing the impact of official action on the private interests.” The Secretary concedes that the delay between *342 a request for a hearing before

an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. *id.*, at 383-384, 386, 95 S.Ct., at 536-537, 538, and the typically modest resources of the family unit of the physically disabled worker,²⁶ the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level.²⁷ See *343 *Arnett v. Kennedy*, *supra*, 416 U.S., at 169, **907 94 S.Ct., at 1651-1652 (Powell, J., concurring in part); *id.*, at 201-202, 94 S.Ct., at 1667-1668 (White, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 617, 94 S.Ct. 1895, 1905, 40 L.Ed.2d 406 (1974); *Friendly, Some Kind of Hearing*, 123 U.Pa.L.Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of “medically acceptable clinical and laboratory diagnostic techniques,” 42 U.S.C. s 423(d)(3), that he is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” s 423(d)(1)(A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and *344 veracity often are critical to the decisionmaking process. *Goldberg* noted

that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." 397 U.S., at 269, 90 S.Ct., at 1021.

[9] By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson v. Perales*, 402 U.S., at 404, 91 S.Ct. at 1428, concerning a subject whom they have personally examined.²⁸ In *Richardson* the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." *Id.*, at 405, 407, 91 S.Ct. at 1428, 1430. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, *345 is substantially less in this context than in *Goldberg*.

The decision in *Goldberg* also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to **908 write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." 397 U.S., at 269, 90 S.Ct., at 1021. In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays

and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. *W. Gellhorn & C. Byse, Administrative Law Cases and Comments* 860-863 (6th ed. 1974).

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access *346 to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg*, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, amici point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% For appealed reconsideration decisions to an overall reversal rate of only 3.3%.²⁹ Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since *347 the administrative review system is operated on an open-file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% To 40% Of the appealed cases, in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

**909 E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased

number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

[10] *348 Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See *Friendly*, supra, 123 U.Pa.L.Rev., at 1276, 1303.

[11] But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143, 60 S.Ct. 437, 441, 84 L.Ed. 656 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." *349 *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S., at 171-172, 71 S.Ct., at 649. (Frankfurter, J., concurring). All that is necessary is that the procedures

be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S., at 268-269, 90 S.Ct., at 1021 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See *Arnett v. Kennedy*, 416 U.S., at 202, 94 S.Ct., at 1667-1668 (White, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for **910 asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971).

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is

Reversed.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL concurs, dissenting.

For the reasons stated in my dissenting opinion in *Richardson v. Wright*, 405 U.S. 208, 212, 92 S.Ct. 788, 791, 31 L.Ed.2d 151 (1972), I agree with the District Court and the Court of Appeals that, prior to termination of benefits, *Eldridge* must be afforded *350 an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, 42 U.S.C. s 601 et seq. See *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is

indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

George P. McLAUGHLIN, petitioner, v. Douglas VINZANT, Superintendent, Massachusetts Correctional Institution. No. 75-5671.

Former decision, 423 U.S. 1037, 423 U.S. 1037, 96 S.Ct. 573.

Facts and opinion, 1 Cir., 522 F.2d 448.

Jan. 26, 1976. Petition for rehearing denied.

Mr. Justice STEVENS took no part in the consideration or decision of this petition.

Parallel Citations

96 S.Ct. 893, 47 L.Ed.2d 18

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 The program is financed by revenues derived from employee and employer payroll taxes. 26 U.S.C. ss 3101(a), 3111(a); 42 U.S.C. s 401(b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, and who have had substantial work experience in a specified interval directly preceding the onset of disability. 42 U.S.C. ss 423(c)(1)(A) and (B). Benefits also are provided to the worker's dependents under specified circumstances. ss 402(b)-(d). When the recipient reaches age 65 his disability benefits are automatically converted to retirement benefits. ss 416(i)(2)(D), 423(a)(1). In fiscal 1974 approximately 3,700,000 persons received assistance under the program. Social Security Administration, *The Year in Review* 21 (1974).
- 2 Eldridge originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12-13. In his reply letter he claimed to have arthritis of the spine rather than a strained back.
- 3 The District Court ordered reinstatement of Eldridge's benefits pending its final disposition on the merits.
- 4 In *Goldberg* the Court held that the pretermination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity (for the recipient) to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U.S., at 266-271, 90 S.Ct., at 1019-1022. In this opinion the term "evidentiary hearing" refers to a hearing generally of the type required in *Goldberg*.
- 5 The HEW regulations direct that each state plan under the federal categorical assistance programs must provide for pretermination hearings containing specified procedural safeguards, which include all of the *Goldberg* requirements. See 45 CFR s 205.10(a) (1975); n. 4, *supra*.
- 6 The Court of Appeals for the Fifth Circuit, simply noting that the issue had been correctly decided by the District Court in this case, reached the same conclusion in *Williams v. Weinberger*, 494 F.2d 1191 (1974), cert. pending, No. 74-205.
- 7 Title 42 U.S.C. s 405(h) provides in full:
"(h) Finality of Secretary's decision.
"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."
- 8 Section 405(g) further provides:
Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript

of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive”

9 The other two conditions are (1) that the civil action be commenced within 60 days after the mailing of notice of such decision, or within such additional time as the Secretary may permit, and (2) that the action be filed in an appropriate district court. These two requirements specify a statute of limitations and appropriate venue, and are waivable by the parties. *Salfi*, 422 U.S., at 763-764, 95 S.Ct., at 2465-2466. As in *Salfi* no question as to whether *Eldridge* satisfied these requirements was timely raised below, see Fed.Rules Civ.Proc. 8(c), 12(h)(1), and they need not be considered here.

10 If *Eldridge* had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court. Cf. *Flemming v. Nestor*, 363 U.S. 603, 607, 80 S.Ct. 1367, 1370-1371, 4 L.Ed.2d 1435 (1960).

11 Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely “practical” approach which the Court has adopted, *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949), when applying the finality requirements of 28 U.S.C. s 1291, which grants jurisdiction to courts of appeals to review all “final decisions” of the district courts, and 28 U.S.C. s 1257, which empowers this Court to review only “final judgments” of state courts. See, e. g., *Harris v. Washington*, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971); *Construction Laborers v. Curry*, 371 U.S. 542, 549-550, 83 S.Ct. 531, 536, 537, 9 L.Ed.2d 514 (1963); *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 557-558, 83 S.Ct. 520, 521-522 (1963); *Cohen v. Beneficial Ind. Loan Corp.*, supra, 337 U.S., at 545-546, 69 S.Ct., at 1225-1226. To be sure, certain of the policy considerations implicated in ss 1257 and 1291 cases are different from those that are relevant here. Compare *Construction Laborers*, supra, 371 U.S., at 550, 83 S.Ct. at 536-537; *Mercantile Nat. Bank*, supra, 371 U.S., at 558, 83 S.Ct., at 522, with *McKart v. United States*, 395 U.S. 185, 193-195, 89 S.Ct. 1657, 1662-1663, 23 L.Ed.2d 194 (1969); L. Jaffe, *Judicial Control of Administrative Action* 424-426 (1965). But the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.

12 Given our conclusion that jurisdiction in the District Court was proper under s 405(g), we find it unnecessary to consider *Eldridge's* contention that notwithstanding s 405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. s 1361, or the Administrative Procedure Act, 5 U.S.C. s 701 et seq.

13 In all but six States the state vocational rehabilitation agency charged with administering the state plan under the Vocational Rehabilitation Act of 1920, 41 Stat. 735, as amended, 29 U.S.C. s 701 et seq. (1970 ed., Supp. III), acts as the “state agency” for purposes of the disability insurance program. Staff of the House Comm. on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 148 (1974). This assignment of responsibility was intended to encourage rehabilitation contacts for disabled workers and to utilize the well-established relationships of the local rehabilitation agencies with the medical profession. H.R.Rep.No.1698, 83d Cong., 2d Sess., 23-24 (1954).

14 Work which “exists in the national economy” is in turn defined as “work which exists in significant numbers either in the region where such individual lives or in several regions of the country.” s 423(d)(2)(A).

15 Because the continuing-disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the post-termination evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however, in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cutoff of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) s 6705.2(c).

16 Information is also requested concerning the recipient's belief as to whether he can return to work, the nature and extent of his employment during the past year, and any vocational services he is receiving.

17 All medical-source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM s 353.4C.

18 The disability recipient is not permitted personally to examine the medical reports contained in his file. This restriction is not significant since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence. CM s 7314. See also 20 CFR s 401.3(a)(2) (1975). The Secretary informs us that this curious limitation is currently under review.

19 The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of the SSA's views. The agency is free to reaffirm its original assessment.

- 20 The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, *Social Security Disability and Mass Justice* 32 (1973). Both the recipient and the agency may adduce new evidence.
- 21 Unlike all prior levels of review, which are de novo, the district court is required to treat findings of fact as conclusive if supported by substantial evidence. 42 U.S.C. s 405(g).
- 22 The Secretary may reduce other payments to which the beneficiary is entitled, or seek the payment of a refund, unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or be "against equity and good conscience." 42 U.S.C. s 404(b). See generally 20 CFR ss 404.501-404.515 (1975).
- 23 This, of course, assumes that an employee whose wages are garnished erroneously is subsequently able to recover his back wages.
- 24 The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need, specified in 42 U.S.C. s 415 (1970 ed., Supp. III). See s 423(a)(2).
- 25 Workmen's compensation benefits are deducted in part in accordance with a statutory formula. 42 U.S.C. s 424a (1970 ed., Supp. III); 20 CFR s 404.408 (1975); see *Richardson v. Belcher*, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).
- 26 Amici cite statistics compiled by the Secretary which indicate that in 1965 the mean income of the family unit of a disabled worker was \$3,803, while the median income for the unit was \$2,836. The mean liquid assets i. e., cash, stocks, bonds of these family units was \$4,862; the median was \$940. These statistics do not take into account the family unit's nonliquid assets i. e., automobile, real estate, and the like. Brief for AFL-CIO et al. as Amici Curiae App. 4a. See n.29, *infra*.
- 27 Amici emphasize that because an identical definition of disability is employed in both the Title II Social Security Program and in the companion welfare system for the disabled, Supplemental Security Income (SSI), compare 42 U.S.C. s 423(d)(1) with s 1382c(a)(3) (1970 ed., Supp. III), the terminated disability-benefits recipient will be ineligible for the SSI Program. There exist, however, state and local welfare programs which may supplement the worker's income. In addition, the worker's household unit can qualify for food stamps if it meets the financial need requirements. See 7 U.S.C. ss 2013(c), 2014(b); 7 CFR s 271 (1975). Finally, in 1974, 480,000 of the approximately 2,000,000 disabled workers receiving Social Security benefits also received SSI benefits. Since financial need is a criterion for eligibility under the SSI program, those disabled workers who are most in need will in the majority of cases be receiving SSI benefits when disability insurance aid is terminated. And, under the SSI program, a pretermination evidentiary hearing is provided, if requested. 42 U.S.C. s 1383(c) (1970 ed., Supp. III); 20 CFR s 416.1336(c) (1975); 40 Fed.Reg. 1512 (1975); see Staff Report 346.
- 28 The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any . . . substantial gainful work which exists in the national economy . . ." 42 U.S.C. s 423(d)(2)(A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. K. Davis, *Administrative Law Treatise* s 7.06, at 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.
- 29 By focusing solely on the reversal rate for appealed reconsideration determinations amici overstate the relevant reversal rate. As we indicated last Term in *Fusari v. Steinberg*, 419 U.S. 379, 383 n. 6, 95 S.Ct. 533, 536-537, 42 L.Ed.2d 521 (1975), in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% Of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, Brief for AFL-CIO et al. as Amici Curiae App. 4a, the deprivation is significantly less than that concomitant to the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal rate falls to 3.3%. See Supplemental and Reply Brief for Petitioner 14.

Exhibit 3

190 Cal.App.4th 616
Court of Appeal, Sixth District, California.

Jeffrey **GOLIN** et al., Plaintiffs and Appellants,
v.
Clifford B. **ALLENBY** et al.,
Defendants and Respondents.

No. H032619. | Nov. 30, 2010. | As
Modified on Denial of Rehearing Dec. 23, 2010.

Synopsis

Background: On their own behalf and purportedly on behalf of their adult daughter, who was a conservatee in custody of the State Department of Developmental Services, mother and father brought action against city and numerous local and state agencies involved in daughter's conservatorship and care, for seventeen causes of action including dependent adult abuse. The Superior Court, Sacramento County, granted and then vacated mother's motion for appointment as daughter's guardian ad litem (GAL), and granted defendants' motion to change venue. The Superior Court, Santa Clara County, No. CV082823, Eugene Hyman, Kevin Murphy, Neal A. Cabrinha, Thomas P. Breen, and J. Michael Byrne, JJ., granted and then vacated mother's new motion for appointment as GAL, granted and vacated the appointment of a professional GAL, recused the entire Santa Clara County bench, granted city's motion to have mother and father declared vexatious litigants, imposed a condition that mother and father post \$500,000 bond, and dismissed the entire action upon mother's and father's failure to post bond. Mother and father appealed.

Holdings: The Court of Appeal, Duffy, J., held that:

- [1] parents were not required to obtain leave to appeal when represented by counsel; but
- [2] mother was "acting in propria persona" as required for vexatious litigant designation;
- [3] evidence supported finding that parents' use of judicial challenges was frivolous; but
- [4] findings in prior proceedings did not have preclusive effect on parents claims.

Reversed.

West Headnotes (39)

[1] **Action**



or vexatious actions

Unnecessary

Parents' oppositions to local and state agencies' various motions and demurrers could not be considered frivolous for purposes of the determination of whether parents were vexatious litigants, in parents' tort action against city and numerous local and state agencies involved in daughter's conservatorship and care. West's Ann.Cal.C.C.P. § 391(b)(3).

Cases that cite this headnote

[2] **Action**



or vexatious actions

Unnecessary

Parents' substitutions of attorney and association of counsel could not be considered frivolous for purposes of the determination of whether parents were vexatious litigants, in parents' tort action against city and numerous local and state agencies involved in daughter's conservatorship and care. West's Ann.Cal.C.C.P. § 391(b)(3).

Cases that cite this headnote

[3] **Action**



or vexatious actions

Unnecessary

Parents' designations of the record on appeal could not be considered frivolous for purposes of the determination of whether parents were vexatious litigants, in parents' tort action against city and numerous local and state agencies involved in daughter's conservatorship and care. West's Ann.Cal.C.C.P. § 391(b)(3).

Cases that cite this headnote

[4] **Action**



or vexatious actions

Costs



and grounds of right in general

Purpose of vexatious litigant statutory scheme is to deal with the problem created by the persistent and obsessive litigant who has constantly pending a number of groundless actions, often against the judges and other court officers who decide or were concerned in the decision of previous actions adversely to him. West's Ann.Cal.C.C.P. § 391 et seq.

Cases that cite this headnote

Unnecessary

and must weigh the evidence to decide both whether the party is vexatious based on the statutory criteria and whether he or she has a reasonable probability of prevailing. West's Ann.Cal.C.C.P. §§ 391, 391.1.

4 Cases that cite this headnote

[5] **Action**



or vexatious actions

Costs



and grounds of right in general

Purpose of vexatious litigant statutory scheme is to curb misuse of the court system by those acting as self-represented litigants who repeatedly relitigate the same issues. West's Ann.Cal.C.C.P. § 391 et seq.

Cases that cite this headnote

Unnecessary [8]

Appeal and Error



nonsuit, or direction of verdict

Appeal and Error



to costs

An order determining a party to be a vexatious litigant and requiring the posting of security is not directly appealable, but if the plaintiff subsequently fails to furnish security, an appeal lies from the subsequent order or judgment of dismissal that follows. West's Ann.Cal.C.C.P. §§ 391.1, 391.3, 391.4.

6 Cases that cite this headnote

[6] **Action**



or vexatious actions

Costs



and grounds of right in general

When considering a motion to declare a litigant vexatious and impose order requiring security, the trial court performs an evaluative function,

Unnecessary

[9]

Appeal and Error



Orders and Proceedings

Trial court's determinations declaring plaintiffs to be vexatious litigants and requiring them to post security were properly reviewable in

Unnecessary

Nature

Dismissal,

Relating

Subsequent

plaintiffs' appeal from the order of dismissal after they failed to post security, even though plaintiffs did not separately appeal from the later judgment. West's Ann.Cal.C.C.P. §§ 391, 391.1, 391.3, 391.4.

3 Cases that cite this headnote

The Court of Appeal will a uphold a ruling declaring a person a vexatious litigant if it is supported by substantial evidence, but if there is insufficient evidence in support of the designation, reversal is required. West's Ann.Cal.C.C.P. § 391 et seq.

7 Cases that cite this headnote

[10] Injunction



cases

Plaintiffs who had been declared vexatious litigants in the trial court were not required to obtain leave from the presiding justice of the Court of Appeal to appeal from the order of dismissal after they failed to post security, where plaintiffs were represented by counsel on appeal, and the quality of plaintiffs' briefing on appeal made it obvious that they had not ghostwritten their appellate briefs with their attorney's name and signature merely affixed. West's Ann.Cal.C.C.P. § 391.7.

Cases that cite this headnote

[13] Particular

Appeal and Error



Appeal and Error



findings implied

Because the trial court is best suited to receive evidence and hold hearings on the question of a party's vexatiousness, reviewing courts presume an order declaring a litigant vexatious is correct and imply findings necessary to support the judgment. West's Ann.Cal.C.C.P. § 391 et seq.

7 Cases that cite this headnote

Injunction

Particular

[11] Action



or vexatious actions

Appeal and Error



of Fact on Motions or Other Interlocutory or Special Proceedings

The trial court exercises its discretion in determining whether a person is a vexatious litigant, and review of the order is accordingly limited and the court of appeal will uphold the ruling if it is supported by substantial evidence. West's Ann.Cal.C.C.P. § 391 et seq.

10 Cases that cite this headnote

[14] Appeal and Error



Unnecessary

of Fact on Motions or Other Interlocutory or Special Proceedings

If there is any substantial evidence to support a trial court's decision that a vexatious litigant does not have a reasonable chance of success in the action, it will be upheld on appeal. West's Ann.Cal.C.C.P. §§ 391.1, 391.3.

14 Cases that cite this headnote

Questions

[12] Appeal and Error



of Fact on Motions or Other Interlocutory or Special Proceedings

Questions

[15] Action



or vexatious actions

Father was "acting in propria persona" in his litigation against agencies and individuals involved in daughter's conservatorship, thus supporting his vexatious litigant designation, even though father initially was represented by counsel, where father began representing himself

Unnecessary

early in the case and he did so through its termination. West's Ann.Cal.C.C.P. § 391(b)(3).

Cases that cite this headnote

[16] Action



or vexatious actions

Trial court's finding that mother's California and New York counsel of record did not exercise professional controls over the representation, leaving her and father to effectively run a tort case regarding daughter's conservatorship as self-represented litigants, in designating mother a vexatious litigant, was supported by substantial evidence, including evidence that the California attorney who was counsel of record had no involvement other than signing the New York attorney's pro hac vice application, and that the New York attorney relied on legal research performed by father and allowed father to draft and serve documents. West's Ann.Cal.C.C.P. § 391(b)(3).

Cases that cite this headnote

[17] Action



or vexatious actions

Trial court acted within its discretion in finding that mother was "acting in propria persona" during tort litigation regarding daughter's conservatorship, in designating mother a vexatious litigant, even though mother was represented by counsel of record throughout the litigation, where the two attorneys of record did not exercise professional controls over the representation, counsel of record left mother and father to effectively run the case as self-represented litigants, a third attorney represented mother for only two months, and a fourth attorney who appeared specially for mother never formally became counsel of record. West's Ann.Cal.C.C.P. § 391(b)(3).

See Annot., Validity, Construction, and Application of State Vexatious Litigant Statutes

(2009) 45 A.L.R.6th 493; Cal. Jur. 3d, Actions, § 54; Cal. Jur. 3d, Costs, §§ 53, 54; Cal. Civil Practice (Thomson Reuters 2010) Procedure, § 15:46; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2010) ¶ 1:921 (CACIVP Ch. 1-G); 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 367.

Unnecessary

Cases that cite this headnote

[18] Action



or vexatious actions

Trial court's implied finding that parents' use of judicial challenges as a litigation tactic in their tort litigation regarding daughter's conservatorship was frivolous and that this practice unreasonably impacted the litigation and other parties involved in it, and placed an unreasonable burden on the court, in designating parents vexatious litigants, was supported by substantial evidence, including evidence that parents filed judicial challenges to every judicial officer assigned to the case after a change of venue to a new county, that parents' judicial challenges directly resulted in recusals only twice, and that the recusal of the county's entire bench was not related to a challenge, but was due solely to the appointment of a defendant to the bench. West's Ann.Cal.C.C.P. § 391(b)(3).

Unnecessary

Unnecessary

Cases that cite this headnote

[19] Action



or vexatious actions

Trial court's finding that mother and father engaged in frivolous tactics in their tort litigation regarding daughter's conservatorship, in designating them vexatious litigants, was supported by substantial evidence, including father's apparent forgeries on proofs of service. West's Ann.Cal.C.C.P. § 391(b)(3).

Unnecessary

Cases that cite this headnote

[20] Action


or vexatious actions

Costs


and grounds of right in general

On a defendant's motion to designate the plaintiff a vexatious litigant and require the posting of security, the burden is on the defendant. West's Ann.Cal.C.C.P. § 391.1; § 390 (Repealed).

Cases that cite this headnote

[21] **Action**


or vexatious actions

Costs


and grounds of right in general

Judgment


constitutes diversity of issues

Trial court's determinations in adult daughter's prior conservatorship proceeding, placing daughter in permanent conservatorship in the custody of the State Department of Developmental Services and granting enumerated powers to its Director through which to act, did not have preclusive effect in parents' subsequent tort action arising from the alleged illegal search of parents' property in the investigation of daughter's living conditions and from parents' having allegedly been maliciously prosecuted in a criminal proceeding, and thus the prior determinations did not establish that parents lacked a reasonable probability of success, as required to impose bond requirement and prefiling order on parents as vexatious litigants. West's Ann.Cal.C.C.P. §§ 391.1, 391.3, 391.7.

Cases that cite this headnote

[22] **Action**

Unnecessary


or vexatious actions

Costs

Nature


and grounds of right in general

Judgment


and effect

Federal district court's determinations in an order dismissing parents' action seeking relief including custody of adult daughter who had been placed under conservatorship did not have preclusive effect in parents' subsequent state court tort action arising from the alleged illegal search of parents' property in the investigation of daughter's living conditions and from parents' having allegedly been maliciously prosecuted in a criminal proceeding, and thus the prior determinations did not establish that parents lacked a reasonable probability of success, as required to impose bond requirement and prefiling order on parents as vexatious litigants, where the district court invoked principles of federal abstention and expressly left parents free to litigate their claims arising under state law in state court. West's Ann.Cal.C.C.P. §§ 391.1, 391.3, 391.7.

Cases that cite this headnote

[23] **Judgment**


and elements of bar or estoppel by former adjudication

The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties involving the same cause of action.

Cases that cite this headnote

[24] **Judgment**


of merger

Unnecessary

Nature

Operation

Nature

Nature

Judgment



of new liability by judgment

Under doctrine of res judicata, a prior judgment for the plaintiff results in a merger and supersedes the new action by a right of action on the judgment.

Cases that cite this headnote

Creation

whether those orders established that parents lacked a reasonable probability of success, as required to impose bond requirement and prefiling order on parents as vexatious litigants. West's Ann.Cal.C.C.P. §§ 391.1, 391.3, 391.7.

1 Cases that cite this headnote

[25] **Judgment**



and elements of bar or estoppel by former adjudication

Under doctrine of res judicata, a prior judgment for the defendant on the same cause of action is a complete bar to the new action.

Cases that cite this headnote

Nature

[28] **Costs**



and grounds of right in general

A showing that a vexatious litigant lacks a reasonable probability of success, as required to impose bond requirement and prefiling order, is ordinarily made by the weight of the evidence, but a lack of merit may also be shown by demonstrating that the plaintiff cannot prevail in the action as a matter of law. West's Ann.Cal.C.C.P. §§ 391.1, 391.3, 391.7.

Cases that cite this headnote

Nature

[26] **Judgment**



and Extent of Estoppel in General

Judgment



actually litigated and determined

Under collateral estoppel, when there is a second action between the same parties on a different cause of action, the first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action.

Cases that cite this headnote

Scope

[29] **Appeal and Error**



on dependent judgments or proceedings

Reversal of trial court's dismissal of parents' action against state and local agencies after finding parents to be vexatious litigants effectively reinstated all causes of action, including those ostensibly brought by daughter who was under conservatorship, even though daughter did not appeal, where daughter was never determined to be a vexatious litigant, and the complaint alleged direct claims by daughter which were not indirectly pleaded by or through her parents. West's Ann.Cal.C.C.P. § 391 et seq.

Cases that cite this headnote

Effect

[27] **Evidence**



in other courts

Court of Appeal would take judicial notice of state court order placing daughter in permanent conservatorship and federal court order dismissing parents' action seeking relief including custody of daughter, in determining

[30] Proceedings

Mental Health



Ad Litem or Next Friend

Mental Health



to appoint

Guardian

Authority

A guardian ad litem may be appointed in addition to a guardian or conservator appointed under the Probate Code for custody purposes, because the role of a GAL, who is appointed only for purposes of the action, is solely to protect and defend the ward's interest in the suit. West's Ann.Cal.C.C.P. § 372(a).

Cases that cite this headnote

[31] **Mental Health**



of authority and appointment of successor

Successor judges had authority to vacate predecessor judges' ex parte orders appointing mother as guardian ad litem (GAL) of adult daughter who was under conservatorship, in parents' and daughter's tort action against state and local agencies, where at the time of the orders appointing mother, the case was not assigned to a particular department for hearing and determination.

Cases that cite this headnote

[32] **Mental Health**



of authority and appointment of successor

The appointment of a guardian ad litem (GAL) is subject to ongoing court supervision and the removal of a GAL, who functions partly as an officer of the court, is a matter within the court's control to be exercised as part of its inherent powers.

1 Cases that cite this headnote

[33] **Mental Health**



duties, and liabilities

The role of the guardian ad litem (GAL) is to protect the incompetent person's rights in the action, to control the litigation, to compromise or settle, to direct the procedural steps, and make stipulations.

1 Cases that cite this headnote

[34] **Mental Health**



duties, and liabilities

The guardian ad litem's (GAL) powers are subject to both the fiduciary duties owed to the incompetent person and the requirement that court approval be obtained for certain acts.

Powers,

Termination Cases that cite this headnote

[35] **Mental Health**



duties, and liabilities

Should a guardian ad litem (GAL) take an action inimical to the legitimate interests of the incompetent person, the court retains the supervisory authority to rescind or modify the action taken.

Powers,

Cases that cite this headnote

[36] **Motions**



Termination

or Setting Aside Orders

A valid order made ex parte may be vacated for cause based on a showing that there was mistake, inadvertence, or fraud in the making of the original order.

Vacating

Cases that cite this headnote

[37] **Judges**



powers and functions in general

Powers,

A successor judge may review an interlocutory ruling of another judge when the facts have changed or when the judge has considered further evidence and law.

Judicial

1 Cases that cite this headnote

[38] **Mental Health**



of appointment

Conservatee in custody of the State Department of Developmental Services could not pursue claims or causes of action on her own behalf, and she could only do so either through her conservator or a duly appointed guardian ad litem (GAL).

Cases that cite this headnote

[39] Evidence



and scope in general

Court of Appeal would not take judicial notice of documents relating to the Assigned Judges Program, in determining whether to transfer parents' tort action against parties involved in daughter's conservatorship to another county, where the Court of Appeal left such a request to the trial court to determine in the first instance on proper motion for relief.

Cases that cite this headnote

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Opinion

DUFFY, J.

***621** Appellants Jeffrey R. Golin and Elsie Y. Golin (collectively, the Golins) appeal from the dismissal of this action after the trial court determined them to be vexatious litigants under Code of Civil Procedure section 391, subdivisions (b)(2) and (3),¹ and they failed to post a \$500,000 bond to continue the litigation under sections 391.3 and 391.4. The Golins contend that the order must be reversed because it found them to be vexatious litigants even though they did not meet the statutory criteria for this finding. They further contend that the order must be reversed because it determined, without legal basis, that there was no reasonable probability of their prevailing in the action, a mandatory determination under section 391.1 before the court can require a vexatious litigant to furnish security. We conclude that the trial court did not abuse its discretion in finding the Golins to be vexatious litigants under section 391, subdivision (b) (3). But because nothing in the record supports the court's conclusion that the Golins have no reasonable probability of prevailing in the action, or any part of it, we reverse the order of dismissal.

STATEMENT OF THE CASE

I. Factual Background²

A. Historical Facts

In 2001, the Golins' daughter Nancy, a woman in her 30's with developmental disabilities, was living in their care and

custody, as she had all her life. In November of that year, Nancy was with her mother, Elsie, at Elsie's studio in Palo Alto when Nancy wandered off.³ The **Golins** began looking for Nancy and called the authorities. But Nancy was not found until she returned on her own the next morning. On her return, police suggested that Nancy should be examined at Stanford Medical Center to ensure that no harm had come to her. And the incident triggered an investigation by authorities into Nancy's living circumstances.

While in the hospital, Nancy was subjected to a Welfare and Institutions Code section 5150 psychiatric hold. After a detention hearing, Nancy was ordered released and the **Golins** went to the hospital to pick her up. But there, *622 they engaged with security guards and Nancy, ostensibly in state custody, was taken to another location unknown to the **Golins**. According to the **Golins** and despite their efforts, they did not learn of Nancy's location **769 until 11 months later when, on the application of the California Department of Developmental Services, the probate court appointed a temporary private conservator over Nancy and set later proceedings to address her conservatorship on a long-term basis.

Meanwhile, in November 2001, the **Golins** were arrested on a felony charge of adult dependent abuse as a result of police investigation into Nancy's living circumstances when she wandered off. The **Golins** posted bail and were released, but not before Elsie was held overnight and a psychiatrist examined her in connection with a possible psychiatric detention. The criminal charges were ultimately dismissed on January 29, 2003.

B. The Conservatorship Proceeding

In October 2003, the probate court conducted a three-week trial to resolve the question of Nancy's conservatorship. As noted, the proceedings were initiated by the Department of Developmental Services (acting through the San Andreas Regional Center (SARC) and Embee Manor, where Nancy then resided), which petitioned the court for its Director to serve as Nancy's permanent limited conservator. (Prob.Code, §§ 1801, 1820, subd. (a)(4).) The **Golins**, named as respondents and representing themselves, strenuously opposed the conservatorship and they alternatively sought an order naming themselves as Nancy's conservators. On October 22, 2003, after several judicial challenges under section 170.6 by one or both of the **Golins** and their unsuccessful efforts to disqualify attorneys for other parties,⁴

the court *623 granted relief and issued a comprehensive Statement of Decision. It determined that (1) Nancy lacks the capacity to care for her own physical and financial **770 needs and therefore a limited conservatorship was justified; (2) the **Golins** are "unable to provide for the best interests of their daughter, Nancy **Golin**, because of their history of continuous conflicts with most medical and other professionals;" (3) "the history of conflict between the **Golins** also renders them unfit to serve as Nancy **Golin's** conservator;" and (4) based on numerous instances in which Nancy suffered burns, food poisoning, and many disappearances while under her parents' care, "there is clear and convincing evidence that the **Golins'** past history of neglect and abuse renders them unable and unfit to provide for the best interests of Nancy **Golin** as her conservator." The court placed Nancy in permanent conservatorship in the custody of the State Department of Developmental Services and granted enumerated powers to the Director through which to act.

The court's Statement of Decision further noted that the **Golins'** conduct during the proceedings showed a clear pattern of inappropriate behavior, including witness coaching, misleading the court, evasiveness, late appearances, interruptions, and other disruptive conduct and that they had resisted providing the court with information about their finances and living situation that bore on their ability to act in the capacity of conservators over Nancy.⁵

C. The Golins' Federal Action

The day after the probate court issued its Statement of Decision resolving the question of Nancy's conservatorship, the **Golins** filed an action in the federal district court. As self-represented litigants, they named themselves and Nancy as individual plaintiffs. They named as defendants, among others, multiple local and state agencies, and employees of those agencies—virtually everyone affiliated with Nancy's conservatorship proceeding and her ongoing *624 custody and care. For example, in addition to Clifford B. **Allenby**, the former Director of the California Department of Developmental Services, named as defendants were Lori Kratzer of the City of Palo Alto Police Department, who had investigated reports that the **Golins** had neglected and abused Nancy, and Malorie Street, the attorney from the Office of the Public Defender who had been appointed to represent Nancy's interests in the conservatorship proceeding.

The **Golins'** 69–page first amended complaint in the federal court alleged in 12 counts civil rights violations (due process and equal protection), a conspiracy to deprive them and Nancy of their civil rights based on the removal of Nancy from the **Golins'** custody, and deficiencies in Nancy's care and treatment since then.⁶ They also alleged fraud, slander, malicious criminal prosecution, wrongful imprisonment, and infliction of emotional distress. They sought damages and injunctive relief, as well as Nancy's return to their custody, but the complaint did not specify which plaintiffs were asserting which claims.

In April 2004, the district court granted a defense motion to dismiss the **Golins'** ****771** first amended complaint under rule 12(b)(6) of the Federal Rules of Civil Procedure. As to plaintiff Nancy **Golin**, who as a conservatee lacks capacity to appear in an action on her own behalf, the court's order determined that the **Golins** lacked standing to pursue her claims, concluding that under rule 17 of the Federal Rules of Civil Procedure and California law (§ 372), a conserved person must appear in an action through a guardian approved by the court or an appointed conservator. The order observed that where an incompetent person is so represented, it is only when the representative is unable to or refuses to act, or there is a conflict between the person and their representative, that a “next friend,” as the **Golins** attempted to qualify themselves, may appear in an action on a conservatee's behalf. And the court concluded that none of these circumstances applied. Moreover, the court noted, constitutional challenges in the federal court may not be vicariously asserted for another through a nonlawyer.

The court also viewed the **Golins'** federal action that in part sought to regain custody over Nancy as an attempt to supplant the California probate court's prior order, which had already decided Nancy's status as a conservatee and her custodial needs, retaining ongoing jurisdiction to address these ***625** issues. Citing federal-abstention doctrines and jurisdictional grounds—centered on the lack of authority of federal courts to directly or indirectly review final state-court determinations—the court rejected this attempt.⁷ And the court noted that because the **Golins** had a remedy in state court for asserted wrongs arising from the conservatorship proceedings—a challenge to the conservator through a removal proceeding under the Probate Code—there was no deprivation of due process. As to most of the **Golins'** state-law claims that the court perceived as independent from a collateral attack on the probate court's order, the court declined to exercise supplemental jurisdiction to adjudicate them in the absence

of an independent ****772** basis for federal jurisdiction, concluding that the claims could be brought in state court. But the court did determine that for section 1983 (42 U.S.C. § 1983) purposes, the **Golins** had failed to state a claim for malicious criminal prosecution on which relief could be granted. Finally, the court's order rejected as frivolous the **Golins'** challenge (asserted three times) to U.S. District Court Judge William Alsup's ability to be impartial and to decide the case according to law. The **Golins** appealed to the Ninth Circuit Court of Appeals, which affirmed the dismissal of the action in June 2005. The **Golins** then petitioned for a writ of certiorari in the United States Supreme Court, which was denied in March 2006.

***626** II. *Procedural Background*

A. The Complaint

On April 26, 2006, the **Golins**, through New York counsel Gerard W. Wallace (who appeared as counsel pro hac vice),⁸ filed this action in the Sacramento County Superior Court. Again named as individual plaintiffs were the **Golins** and Nancy. There were numerous named defendants, again local and state agencies and their employees involved in events leading to Nancy's conservatorship and her care.⁹ The 110–page complaint purported to assert 19 causes of action, many of which had been similarly alleged in the federal action. One distinction was that in this action, the **Golins** did not expressly seek to regain custody over Nancy, as they had in the federal proceedings. But the core factual allegations giving rise to the claims all related to the search of the **Golins'** home in connection with Nancy's brief disappearance, the criminal prosecution of the **Golins**, the removal of Nancy from their custody, and Nancy's treatment while in state custody.

Shortly after filing the complaint, which was not immediately served, the **Golins** submitted an ex parte application, with no notice to any defendants, for an order appointing Elsie as Nancy's guardian ad litem to represent her interests in the action. The application, which was granted, contended that the appointment was needed because Nancy's conservator was a defendant in the action and it was thus necessary for a third party to represent Nancy's interests and protect her rights as asserted in the complaint.

****773** In August 2006, the **Golins** filed their 135–page verified first amended complaint, the operative pleading in the action. It named additional parties as ***627** defendants and purported to allege 17 causes of action, all of which

stemmed from the same essential operative facts alleged in the initial complaint.¹⁰

B. Change of Venue

In July 2006, before any formal appearance by defendants in the action, some of them moved on numerous grounds to change venue from Sacramento County to Santa Clara County. Over the **Golins'** objection, the motion was granted by written order filed October 10, 2006, under section 394. The **Golins**, with Jeffrey now representing himself, moved for reconsideration of the order, but in response, the court affirmed its prior order transferring venue to Santa Clara County. The **Golins** petitioned for a writ of mandate in the Third District Court of Appeal, but that was denied. They also petitioned for review in the California Supreme Court, but that too was denied.

Before the case was formally transferred to Santa Clara County, and although the entire action was already stayed, defendant SARC sought a stay of the court's prior order appointing Elsie **Golin** as Nancy's guardian ad litem pending a formal motion to vacate the order. The asserted basis of the request was that a specific stay of the guardian-ad-litem order was necessary because the **Golins** were improperly using it to acquire Nancy's medical records. The application for a stay of the order was heard by a different judge than the one who had originally granted the order. Rather than just stay the order as requested, the court vacated it, concluding that Elsie had been erroneously appointed guardian ad litem for Nancy without notice to anyone and without *628 the court having been provided the Santa Clara County Superior Court's Statement of Decision in the probate proceeding in which Nancy had been conserved, which **774 the court then had before it. The court also agreed that the **Golins** were exercising the appointment powers in a manner that could be harmful to Nancy. The vacation of the guardian ad litem order was without prejudice to Elsie **Golin** renewing her application once venue of the action was formally transferred to Santa Clara County.

C. Initial Proceedings in Santa Clara County

When the action was first transferred to Santa Clara County, Elsie **Golin** once again applied ex parte, without notice to defendants, for an order appointing her as Nancy's guardian ad litem in the action. The application, which was filed by attorney Lara Shapiro as newly associated counsel for Elsie **Golin**, was granted by Judge Eugene Hyman on April 9, 2007. Two weeks later, SARC moved ex parte to vacate the

order, again on the bases that no notice had been given to defendants of Elsie's application and that Judge Hyman had not been provided with Judge Martin's decision in the prior probate proceeding determining that the **Golins** were unfit to serve as Nancy's conservators. Judge Kevin Murphy granted SARC's application, vacating and annulling Elsie's most recent appointment as Nancy's guardian ad litem "without prejudice" to Elsie reapplying.

Elsie promptly reapplied on noticed motion to be appointed Nancy's guardian ad litem in the action. She alternatively sought the appointment of John Lehman, the "visit supervisor" for the **Golins'** visits with Nancy, as guardian ad litem. Defendants opposed the motion, which was heard before Judge Hyman, sitting in probate. The court determined that Nancy needed the appointment of a guardian ad litem for purposes of the action, but appointed Claudia Johnson, an "independent private professional who will also retain counsel," and not Elsie **Golin** as requested.

But in June 2007, Claudia Johnson moved the court for an order vacating her appointment on the basis that she was unaware that the court had been considering appointing her as guardian ad litem for Nancy, that she had not received any notice of that, and that time commitments in other cases precluded her ability to act in this case for Nancy. The court granted relief and vacated her appointment, leaving Nancy, a conservatee, without a representative to act on her behalf in the action.

Meanwhile, different defendants filed several motions challenging the first amended complaint, including demurrers, motions to strike, motions for judgment on the pleadings, and an anti-SLAPP motion (§ 425.16). The motions were initially set to be *629 heard in June 2007. Around this time, Lara Shapiro's representation of Elsie terminated such that Elsie remained represented in the action by attorneys of record Geoffrey White and Gerard Wallace with Jeffrey **Golin** continuing to represent himself.

Before the defense motions could be heard, the **Golins** challenged Judge Kevin Murphy, to whom the pending matters in the case had been assigned for decision, for cause under section 170.1. Judge Murphy recused himself and the matters were taken off calendar.

The **Golins** also filed a motion to change venue on the asserted ground that they could not receive a fair trial in Santa Clara County. And they moved ex parte for reconsideration

of Elsie's application for an order appointing her as Nancy's guardian ad litem in view of Claudia Johnson's inability to serve in that role. Jeffrey **Golin** also filed a for-cause challenge under section 170.1 to Judge Eugene Hyman, who had denied Elsie's previously noticed guardian ad litem application and appointed Claudia Johnson instead. After consideration by a judge assigned from another county, the challenge to Judge Hyman was denied.

The pending matters were then reassigned to Judge Neal A. Cabrinha, whom Jeffrey **Golin** also challenged for cause under section 170.1, and the matters were continued. After consideration by a different judge assigned from an outside county, the challenge to Judge Cabrinha was denied. Jeffrey **Golin** also filed a peremptory challenge to Judge Cabrinha under section 170.6. But on July 23, 2007, one of the defendants (Jacqueline Duong) was appointed as a judge to the Superior Court of Santa Clara County, "necessitating the recusal of all judges of the Superior Court of the County of Santa Clara," and the entire Santa Clara County bench disqualified itself from hearing the case.¹¹ The matter was then assigned by the Judicial Council to Judge Thomas P. Breen (Ret.) and the pending matters remained set for hearing on August 24, 2007.

On August 22, 2007, the **Golins** amended their motion for change of venue, adding as a basis for it that they could not receive a fair trial in Santa Clara County because the entire bench had recused itself. Judge Breen denied the motion by written order filed two days later. The defense motions and challenges to the first amended complaint that had been pending since June were again continued to September 17, 2007, and additional challenges to the pleading were filed by one defendant and joined by others. The **Golins** filed a ***630** motion for reconsideration of their previous motion for change of venue, which was calendared for the same date. And on that date, Jeffrey **Golin** filed a challenge of Judge Breen for cause under section 170.1. At the September 17, 2007 hearing, the court rejected the challenge as untimely and the remaining pending matters were continued again.¹² The next day, Jeffrey **Golin** filed a "Notice of Disqualification" of Judge Breen, this time under section 170.3, asserting among other things that Judge Breen had himself improperly ruled on the prior for-cause challenge and that he must recuse himself from the case. At the September 21, 2007 continued hearing of the pending motions, Judge Breen recused himself from the case in "the interest of justice," the judge perceiving Jeffrey **Golin's** challenges to him as a "distraction" to the matters at hand, and the pending matters were again continued.

The **Golins** then filed a "renotice" of the prior motion for reconsideration of Elsie's application for an order to be appointed Nancy's guardian ad litem, the prior reconsideration motion never having been ruled upon after the challenge to Judge Hyman, who had initially ruled on the matter, and the subsequent recusal of the entire Santa Clara County bench.¹³ And they filed a motion for change of venue "on ****776** grounds of changed circumstances and forum non-conveniens," citing again their inability to receive a fair trial in Santa Clara County due to the recusal of the bench but also the inconvenience of having an out-of-county judge temporarily assigned by the Judicial Council in that there was no judge readily available in the county for ex parte or urgent matters and for regularly scheduled hearings.¹⁴

D. The Vexatious Litigant Motion and the Court's Order

On October 11, 2007, defendant City of Palo Alto filed a motion to have the **Golins** declared vexatious litigants within the meaning of section 391, subdivisions (b)(2) and (3); to require them to post security to continue the litigation; and to have the court issue a prefiling order requiring the **Golins** to obtain the signature of the presiding judge before filing any future similar claims. The asserted grounds for the motion were that the **Golins'** claims had been fully litigated in previous proceedings, the present action constitutes mere relitigation of their meritless claims, and the **Golins** had engaged in delaying and harassing tactics by filing frivolous and repetitive pleadings in ***631** the action.¹⁵ But no evidence going to the merits of the case to show that there was no likelihood of the **Golins'** prevailing was offered or argued in support of the motion. The other defendants joined the motion and the case was assigned by the Judicial Council to Judge J. Michael Byrne (Ret.) from outside of Santa Clara County.

The **Golins** opposed the motion and filed as part of their opposition declarations from Elsie's attorney Gerard Wallace and attorney David Beauvais, who had specially appeared on her behalf, to the general effect that neither was acting as a mere "puppet" for the **Golins** even though Jeffrey **Golin** as a self-represented litigant was "doing the footwork" for the case and was performing legal research that each attorney said he had reviewed. And Jeffrey **Golin** filed a peremptory challenge to Judge Byrne under section 170.6, which Judge Byrne denied as untimely and as being statutorily unavailable to Jeffrey **Golin** because he had already exercised his right to file a peremptory challenge in the case.

As part of the City of Palo Alto's reply and supplemental reply to the motion, it offered evidence that Elsie's attorney Geoffrey White had done nothing in the case other than sign on as local counsel to attorney Wallace's pro hac vice application and that the attorneys' signatures on the **Golins'** opposition to the vexatious litigant motion, and the Wallace and Beauvais declarations filed in support of it, had all actually been signed by someone other than the attorneys themselves. Moreover, ****777** attorney Beauvais had not substituted in or associated as counsel of record for Elsie **Golin**, continuing to appear specially for her. In addition, the City of Palo Alto offered evidence that the signatures of third parties on multiple proofs of service for documents filed by the **Golins** were forged, as the third parties so testified at the hearing.¹⁶ As to the attorneys' signatures on their declarations, they each offered at the hearing that they had authorized the **Golins** to sign them on their respective behalf.

***632** During the hearing, Judge Byrne noted that part of what he had to decide was whether there was a likelihood of the **Golins'** prevailing in the case and he expressed some reservation based on what was before him about coming to that conclusion. He also pressed the moving parties to specify what particular filings by the **Golins** in the case could be characterized as abusive, repetitive, or frivolous. But the defendants were unable to then provide a specific response, offering to later compile a list and generally describing the **Golins'** various unsuccessful and repetitive efforts to have a guardian ad litem appointed for Nancy and to change venue. But defendants returned to their general point that the entire action constituted mere relitigation of issues that had already been decided in the two prior proceedings, though they did not provide any real analysis for this conclusion in their papers or otherwise.

[1] [2] [3] The court admitted into evidence at the judgment hearing the declaration of David Beauvais that Jeffrey **Golin** had signed, two forged proofs of service, and the court's register of actions on which defense counsel had marked 29 documents filed by the **Golins** that counsel contended were either "amended or supplemental" to documents already filed or constituted repetitive filings.¹⁷

In announcing his ruling from the bench, Judge Byrne noted that the court register of actions reflected numerous filings by the **Golins**, including multiple requests for reconsideration of prior rulings, in connection with the guardian ad litem and venue issues. The court questioned whether this was

sufficient to find a party vexatious. But it observed that though each of the **Golins'** filings viewed in isolation might be reasonable, it was when the court considered the additional time and delay necessitated by the **Golins'** revisitation of issues and the volume of their supplemental and amended filings that a "level of vexatiousness" was reached, speaking to an improper attempt by the **Golins** to "grind down the other side" or keep them from "being able to move forward" in the litigation. ****778** This, the court concluded, "created an unmeritoriousness to the [filings] themselves."¹⁸ As a result, the court granted the motion determining the **Golins** to be vexatious litigants and imposed a condition that they post a bond in the amount of \$500,000 in order to continue with the litigation. When counsel for Elsie **Golin** questioned whether the court had addressed the likelihood of the **Golins'** prevailing in the action in its determination, which the statute required as a condition to the bond ***633** requirement, the court said it had relied on the district court's order dismissing the **Golins'** federal action in reaching the conclusion that the **Golins** were unlikely to prevail in this case. Finally, the court set a date by which the **Golins** would have to post the bond or face dismissal and it issued an order to show cause to this effect. The court's written order filed after the hearing additionally specified that the **Golins** had qualified as vexatious litigants under section 391, subdivision (b)(2) and (3) and it also imposed a pre-filing requirement that they obtain the signature of the presiding judge before commencing any further actions as self represented litigants.

E. The Dismissal of the Action

The **Golins** failed to post the bond as required by the court's order. At the order-to-show-cause hearing that followed, the court dismissed the entire action, with prejudice, signing an order so providing.¹⁹ Judgment was later entered. The **Golins** appealed from both the order of dismissal and

DISCUSSION

I. The Statutory Scheme

The vexatious litigant statutes, section 391 et seq., which were enacted in 1963, provide two distinct and cumulative remedies against vexatious litigants, both of which were invoked here.²⁰ ***634** (*Holcomb v. **779 U.S. Bank Nat. Assn.* (2005) 129 Cal.App.4th 1494, 1499, 29 Cal.Rptr.3d 578 (*Holcomb*)).) The first of these remedies is an order to

furnish security, as described in section 391.3.²¹ A defendant obtains this remedy, as was done here, by bringing a motion under section 391.1,²² which requires determinations that the plaintiff is a vexatious litigant and that there is no reasonable probability that he or she will prevail on the merits in the action. If the court issues an order to furnish security, the action is automatically stayed from the time the motion was filed until 10 days after plaintiff posts the required security. (§ 391.6.) If the plaintiff fails to post the security, the action “shall be dismissed as to the defendant for whose benefit it was ordered furnished.” (§ 391.4.)

Section 391.7 provides the second and additional remedy. It authorizes the court to “enter a prefiling order which prohibits a vexatious litigant from filing any litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed.” (§ 391.7, subd. (a).) The presiding judge may allow the filing of the new action “only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.” (§ 391.7, subd. (b).)

[4] [5] “ ‘The vexatious litigant statutes were enacted to require a person found a vexatious litigant to put up security for the reasonable expenses of a defendant who becomes the target of one of these obsessive and persistent litigants whose conduct can cause serious financial results to the unfortunate object of his attack. The purpose of the statutory scheme is to deal with the problem created by the persistent and obsessive litigant who has constantly pending a number of groundless actions, often against the judges and other court officers who decide or were concerned in the decision of previous actions adversely to him.’ ” (*Holcomb, supra*, 129 Cal.App.4th at p. 1504, 29 Cal.Rptr.3d 578, *635 quoting **780 *First Western Development Corp. v. Superior Court* (1989) 212 Cal.App.3d 860, 867–868, 261 Cal.Rptr. 116.) It is to curb misuse of the court system by those acting as self-represented litigants who repeatedly relitigate the same issues. “Their abuse of the system not only wastes court time and resources but also prejudices other parties waiting their turn before the courts.” (*Singh v. Lipworth* (2005) 132 Cal.App.4th 40, 44, 33 Cal.Rptr.3d 178.)

[6] [7] When considering a motion to declare a litigant vexatious under section 391.1, the trial court performs an evaluative function. The court must weigh the evidence to

decide both whether the party is vexatious based on the statutory criteria and whether he or she has a reasonable probability of prevailing. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 786, 55 Cal.Rptr.3d 112, 152 P.3d 416 (*Moran*).) Accordingly, the court does not assume the truth of a litigant's factual allegations and it may receive and weigh evidence before deciding whether the litigant has a reasonable chance of prevailing. (*Id.* at p. 785, fn. 7, 55 Cal.Rptr.3d 112, 152 P.3d 416.)

II. Appealability

[8] [9] An order determining a party to be a vexatious litigant and requiring the posting of security under section 391.3 is not directly appealable. But if the plaintiff subsequently fails to furnish security, an appeal lies from the subsequent order or judgment of dismissal that follows under section 391.4. (*Childs v. PaineWebber, Inc.* (1994) 29 Cal.App.4th 982, 985, 988, 35 Cal.Rptr.2d 93; *Roston v. Edwards* (1982) 127 Cal.App.3d 842, 846, 179 Cal.Rptr. 830 (*Roston*).) The **Golins** have appealed from the order of dismissal, and the trial court's prior determinations declaring them to be vexatious litigants and requiring them to post security are accordingly properly reviewable in this appeal.²³

[10] Respondents challenge the **Golins'** right to bring this appeal without their first having obtained leave to do so from the presiding justice of this court. As noted, under section 391.7, a party who has been declared a vexatious litigant and who is the subject of a section 391.7 prefiling order as the **Golins** are here cannot file or maintain litigation as a self-represented litigant without first obtaining leave of the presiding judge of the court where the litigation is or would be venued. This bar extends to appeals such that a vexatious litigant contemplating a pro per appeal must first obtain permission from the presiding justice of the appropriate reviewing court. (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216–1217, 73 Cal.Rptr.2d 288.)

*636 The **Golins** are not, however, pursuing this appeal as self represented litigants, whether actually or de facto. They are represented by able counsel and, based on the quality of their briefing on appeal, as opposed to many of their papers filed in the trial court, we surmise that neither of the **Golins** has ghostwritten their appellate briefs with their attorney's name and signature merely affixed. It is obvious in this appeal that counsel of record for the **Golins** is not acting as a mere puppet for either of them and the bar of section 391.7's prefiling requirement applicable to self-represented

vexatious litigants accordingly does not apply to this appeal. (Cf., ****781** *Muller v. Tanner* (1969) 2 Cal.App.3d 438, 444, 82 Cal.Rptr. 734 (*Muller*) [vexatious litigant statutes providing for dismissal of action may apply even when party is represented by counsel in the action, which merely realleged sham allegations of prior pleading]; *In re Shieh* (1993) 17 Cal.App.4th 1154, 1166–1168, 21 Cal.Rptr.2d 886 (*Shieh*) [vexatious litigant subject to new prefilng order in court of appeal notwithstanding representation by counsel on appeal as it was apparent that litigant himself and not counsel continued to prepare filed documents].) We accordingly decline to dismiss the appeal, readily dispensing with this challenge to appealability.

III. Standard of Review

[11] [12] [13] The trial court exercises its discretion in determining whether a person is a vexatious litigant. Review of the order is accordingly limited and the court of appeal will uphold the ruling if it is supported by substantial evidence. Because the trial court is best suited to receive evidence and hold hearings on the question of a party's vexatiousness, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment. (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219, 120 Cal.Rptr.2d 879; *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 969, 67 Cal.Rptr.3d 818.) Of course, we can only imply such findings when there is evidence to support them. When there is insufficient evidence in support of the designation, reversal is required. (*Roston, supra*, 127 Cal.App.3d at p. 848, 179 Cal.Rptr. 830.)

[14] Likewise, a court's decision that a vexatious litigant does not have a reasonable chance of success in the action is based on an evaluative judgment in which the court weighs the evidence. If there is any substantial evidence to support the court's determination, it will be upheld. (*Moran, supra*, 40 Cal.4th at pp. 784–786, 55 Cal.Rptr.3d 112, 152 P.3d 416.) But questions of statutory construction or interpretation are still reviewed de novo, as are questions of law. (*Holcomb, supra*, 129 Cal.App.4th at pp. 1498–1499, 29 Cal.Rptr.3d 578.)

***637 IV. The Court Did Not Abuse its Discretion in Finding the Golins to be Vexatious Litigants Under Section 391, Subdivision (b)(3)**²⁴

The Golins challenge the trial court's determination that they qualified as vexatious litigants under section 391.

subdivision (b)(3). As noted, this statute provides in pertinent part that a vexatious litigant is a person who “[i]n any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers ... or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.” (§ 391, subd. (b)(3), italics added.)

[15] The first element of their challenge relates to whether the Golins were acting in propria persona in the litigation. Jeffrey Golin began representing himself early in the case and he did so through its termination. There is accordingly no question that as to this element, the statute is satisfied as to him. The thornier ****782** question is whether Elsie Golin can be said to have been acting in propria persona when she had counsel of record (attorneys White and Wallace throughout and Shapiro during some of the time).²⁵

[16] Respondents observe that even though Elsie was technically represented by counsel, there is evidence in the record that attorney White had nothing to do with the Golins' litigation activity other than signing attorney Wallace's pro hac vice application. They further point out that there is evidence in the record that attorney Wallace's actual representation of Elsie in the action was limited in that Jeffrey Golin was performing the legal research on which Wallace relied as well as drafting and serving legal documents for himself and Elsie. Jeffrey even sometimes signed Wallace's name not just on legal memoranda but also on a declaration purporting to be that of Wallace and he did the same with attorney Beauvais, albeit with the attorneys' approval as to the declarations.²⁶ There is also evidence in the record that Jeffrey Golin forged proofs of service relating to documents on which Wallace's name appeared as counsel and that service of legal documents on the Golins' behalf ***638** was frequently irregularly performed, suggesting that Wallace exercised little or no control or supervision over Jeffrey Golin, who was acting for Elsie Golin, Wallace's client, in matters pertaining to the day to day conduct of the litigation.²⁷

Based on this evidence, respondents cite *Muller* and *Shieh* for the general proposition that where counsel functions as a mere puppet by only nominally appearing for a party who is effectively acting as a self represented litigant, and who is actually controlling the conduct of the litigation by drafting pleadings and other legal documents, the representation is a sham and it will not defeat application of the vexatious litigant statutes. (*Muller, supra*, 2 Cal.App.3d at p. 444, 82 Cal.Rptr. 734; *Shieh, supra*, 17 Cal.App.4th at pp. 1167–

1168, 21 Cal.Rptr.2d 886.) The **Golins** counter that neither case applies because in each, the party had been declared a vexatious litigant while acting pro per in a prior action, and it was only in the subsequent action where the party's attorney representation was disregarded in order to apply the vexatious litigant remedies.

While it is true that the plaintiffs in *Muller* and *Shieh* had each been declared a vexatious litigant in a prior action and the **Golins** have not, the holdings of these cases do not rest on this circumstance. Rather, they stand for the general proposition, as argued by respondents here, that where a party effectively conducts himself or herself in an action as a self represented litigant without the professional and ethical considerations that constrain counsel, **783 the party's nominal engagement of an attorney will not insulate him or her from the statutory consequences of the vexatious litigant provisions. And neither case limits its reach to the factual circumstance in which the party had already been determined to be a vexatious litigant in a prior action.

[17] Accordingly, that Elsie **Golin** was represented by counsel of record throughout the litigation is no bar to the court determining that she is nevertheless a vexatious litigant under section 391, subdivision (b)(3) when counsel did not exercise professional controls over the representation, leaving her and Jeffrey **Golin** to effectively run the case as self-represented litigants. Because the court's conclusion in this regard is supported by substantial evidence in the record, we cannot say that the court abused its discretion in determining Elsie to be a vexatious litigant under section 391, subdivision (b)(3) simply because she was technically—but in some sense only nominally—represented by counsel.

[18] The **Golins** also contend that they were not demonstrated to have repeatedly filed unmeritorious motions, pleadings, or other papers or to have *639 engaged in tactics that were frivolous or solely intended to cause unnecessary delay under section 391, subdivision (b)(3). We agree that the trial court did not find that the **Golins** had repeatedly filed motions, pleadings, or other papers that were individually determined to be unmeritorious under the first, disjunctive prong of this subdivision. But the court's comments at the hearing suggest that it reached the conclusion that the **Golins** were vexatious not because of individual unmeritorious filings but because of their litigation tactics—their regular practice of revisiting issues and the volume of their supplemental and amended filings that cumulatively evidenced a “level of vexatiousness.” According to the

trial court, together these spoke to an improper motive to “grind down the other side” or to keep them from “being able to move forward” in the litigation. This goes to the third, disjunctive prong of section 391, subdivision (b)(3)—engaging in tactics that are frivolous *or* solely intended to cause unnecessary delay.²⁸

Based on our review of the voluminous record in this case, there is substantial evidence from which to imply findings in support of the trial court's ultimate determination about the **Golins'** litigation tactics. We need only examine one topic—their challenges to every judicial officer assigned to this case in Santa Clara County—to reach this conclusion. This is because the record demonstrates that the **Golins'** persistent and obsessive use of judicial challenges in this action, both peremptory and for cause and without regard to timeliness or validity, rises to the level of a frivolous litigation tactic that qualifies them as vexatious litigants under section 391, subdivision (b)(3), even though the trial court did not specifically cite this tactic in its ruling.²⁹

The **Golins** contend that because a portion of their challenges resulted in judges' **784 recusals, their conduct in this regard cannot be characterized as frivolous. But in this case alone, their judicial challenges directly resulted in recusals only twice and more often, they did not. That the entire Santa Clara County bench ultimately recused itself was not related to a challenge by the **Golins**, and their overall lack of success with judicial challenges is therefore not cured by this en masse recusal, which was due solely to defendant Jacqueline Duong being appointed to the Santa Clara County bench.³⁰ *640 Accordingly, there is substantial evidence to support an implied finding that the **Golins'** use of judicial challenges as a litigation tactic was frivolous and that this practice unreasonably impacted the litigation and other parties involved in it, and placed an unreasonable burden on the court.

[19] Jeffrey **Golin's** apparent forgeries on the **Golins'** proofs of service also qualify as substantial evidence of frivolous tactics in that such conduct is a flagrant abuse of the system.

In sum, Jeffrey **Golin** was acting in propria persona in the litigation and Elsie **Golin's** legal representation of record does not preclude the same conclusion, in fact, as to her. Moreover, based on their numerous unsuccessful judicial challenges, and the forged proofs of service on their documents, there is substantial evidence in the record to support the conclusion that the **Golins** are vexatious litigants under section 391,

subdivision (b)(3), in that they have engaged in litigation tactics that can be described as frivolous. No more is required under this subdivision, which specifies neither a quantity of actions necessary to fit the bill nor a timeframe within which the actions had to have taken place in order for a party to be designated a vexatious litigant. (*Morton v. Wagner, supra*, 156 Cal.App.4th at p. 971, 67 Cal.Rptr.3d 818.)

V. The Trial Court Abused its Discretion in Concluding That the Moving Parties Had Demonstrated the Unlikelihood of the Golins' Prevailing on the Merits

[20] As noted, section 391.1 provides that on motion of a defendant, the court may require the posting of security by the plaintiff if it determines, on an evidentiary showing, both that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the action against the moving defendant. (See also § 391.3.) The burden on the motion is on the moving party and the court is required to weigh the evidence in exercising its discretion to determine whether the plaintiff has no reasonable likelihood of prevailing in the action. (*Moran, supra*, 40 Cal.4th at p. 786, 55 Cal.Rptr.3d 112, 152 P.3d 416.)

[21] [22] Here, the moving parties offered no evidence relating to the merits of **785 the case, relying instead, with little analysis, on the asserted preclusive effect of the court's prior determinations in the conservatorship proceeding and the district court's determinations in its order dismissing the Golins' federal action. And in concluding that there was no reasonable likelihood of the Golins' prevailing in the action, the court said that it had relied on the district court's order.

[23] [24] [25] [26] *641 But neither order demonstrated to compel the conclusion that there is no reasonable probability that the Golins, as a matter of law, are unlikely to prevail on any of their claims in this case. As the Golins contend, such a showing depends not on whether this case constitutes relitigation within the meaning of the vexatious litigant statutes (see, e.g., § 391, subd. (b)(2)) but instead on whether either or both orders already determined all of the issues raised in this action such that the entire action is barred as a matter of law, something that has not been shown and something of which we are not convinced.³¹

The Golins contend that neither prior order had preclusive effect because neither determined, on the merits, the same issues or claims as are raised here. The conservatorship proceeding resolved only whether Nancy should be conserved

and if so, who should then be appointed to act as her conservator. It did not purport to decide other issues. The district court, they contend, didn't decide anything on the merits but instead dismissed the Golins' case, in which they had sought among other things custody of Nancy, by invoking principles of federal abstention that left them free, as the order expressly stated, to litigate their claims arising under state law in state court. Accordingly, even if the order could be argued to be determinative of some of the Golins' claims made here, the same cannot be said of their state law claims that the order left expressly unresolved and preserved.

Respondents devote just over one page of their brief to the question whether the Golins are unlikely to prevail on the merits of the case. They cite no authority and offer no real analysis to support their bald conclusion that because of the two prior orders, there is no reasonable likelihood that the Golins will prevail against them on any cause of action.

[27] We conclude that on the face of it, neither of the orders (of which we take judicial notice) determined the merits of essential claims raised here by the Golins—their entitlement to damages arising from the alleged illegal search of their property and from their having allegedly been maliciously prosecuted *642 in a criminal proceeding. And while the Golins' operative **786 pleading does not differentiate which particular claims are made by which plaintiff against which defendant, none of the defendants offered any evidence going to the merits of any claims or causes of action arising from these general facts. Moreover, though the first amended complaint is far from an example of model pleading, none of the defendants directly challenged it on the vexatious litigant motion for potentially dispositive pleading defects with respect to any allegation or cause of action.

[28] As we have stated, on a motion for an order requiring a vexatious litigant to post security, the moving party must make a showing that there is no reasonable likelihood of the plaintiff prevailing in the action against that defendant. This showing is ordinarily made by the weight of the evidence but a lack of merit may also be shown by demonstrating that the plaintiff cannot prevail in the action as a matter of law. The moving parties here failed to do either. And while we are required to imply findings where possible to support the trial court's order, we find no evidentiary or legal basis from which to do so here. In the absence of such a basis, we conclude that the court abused its discretion in determining, based on what was before it, that there was no reasonable likelihood of

the **Golins'** prevailing in the action on any of their claims or causes of action.³²

Before a vexatious litigant can be required to post security, the court must also determine that there is no reasonable probability that the plaintiff will prevail in the action against the moving defendant. Because we conclude that the court abused its discretion in reaching this determination by having done so without legal or evidentiary basis, we will reverse the order of dismissal and the court's order requiring the **Golins** to post security on which the dismissal was based.

VI. Nancy's Claims

[29] We have concluded that the trial court's dismissal of the entire action must be reversed. This reversal will effectively reinstate all causes of action alleged in the first amended complaint, including those ostensibly brought by Nancy, who was never determined to be a vexatious litigant and whose claims therefore should not have been dismissed through the vexatious litigant statutes. (*Estate of McDill* (1975) 14 Cal.3d 831, 840, 122 Cal.Rptr. 754, 537 P.2d 874 [general reversal encompasses entire judgment where claims are inextricably interwoven]; [*Warren v. Merrill* (2006) 143 Cal.App.4th 96, 108, 49 Cal.Rptr.3d 122].) Contrary to respondents' contentions, the first *643 amended complaint alleges direct claims by Nancy, whether or not the claims are meritorious or viable. Her claims are not indirectly pleaded by or through her parents, the **Golins**, appearing on her behalf.

[30] But the status of Nancy's claims remains in question as she, a conserved person, lacks the capacity to appear on her own behalf as a party to litigation and must appear instead through a guardian or conservator of the estate or a guardian ad litem appointed by the court in which the action is pending, or a judge thereof. (§ 372, subd. (a).) A guardian ad litem may be appointed in addition to a guardian or conservator appointed under the Probate Code for custody purposes. This is **787 because the role of a guardian ad litem, who is appointed only for purposes of the action, is solely to protect and defend the ward's interest in the suit. (*Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 47, 54 Cal.Rptr.3d 13.) This is a different role from a guardian or conservator appointed for custody or other purposes under the Probate Code. (*D.G. v. Superior Court* (1979) 100 Cal.App.3d 535, 545–546, 161 Cal.Rptr. 117.)

[31] Because Nancy cannot appear on her own behalf, and no guardian ad litem is currently appointed for her, her

claims are presently at risk of dismissal. The **Golins** contend that Elsie remains Nancy's duly appointed guardian ad litem because the orders vacating her appointment are void, having been made by judges other than the ones who appointed her. They cite *Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 741–742, 233 Cal.Rptr. 607 (*Ford*) in support of this proposition. But in *Ford*, a plaintiff filed a complaint seeking to overturn a judgment previously rendered in another action by the same court. The court of appeal held that a judgment rendered in one department of the superior court is not subject to interference or restraint by another department of the same court because the power of appellate review is vested in our courts of appeal and the Supreme Court by virtue of the California Constitution. (*Ibid.*) And when a matter is assigned for hearing and determination to one department of a superior court, it is beyond the power of another department of the same court to interfere with that jurisdiction. (*Ibid.*)

[32] [33] [34] [35] The circumstances in *Ford* are a far cry from those here concerning Elsie's appointment as Nancy's guardian ad litem and the vacation of those orders. Whether in Sacramento County or Santa Clara County, at the time of the ex parte orders appointing Elsie, the case was not assigned to a particular department for hearing and determination. Moreover, the appointment of a guardian ad litem is subject to ongoing court supervision and the removal of *644 a guardian ad litem, who functions partly as an officer of the court, is a matter within the court's control to be exercised as part of its inherent powers. (*Estate of Hathaway* (1896) 111 Cal. 270, 271, 43 P. 754; *Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 13, 118 Cal.Rptr. 21, 529 P.2d 53; *In re Marriage of Caballero* (1994) 27 Cal.App.4th 1139, 1148–1149, 33 Cal.Rptr.2d 46.) The role of the guardian ad litem is to protect the incompetent person's rights in the action, to control the litigation, to compromise or settle, to direct the procedural steps, and make stipulations. (*In re Charles T.* (2002) 102 Cal.App.4th 869, 875–876, 125 Cal.Rptr.2d 868.) The 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. (*J.W. v. Superior Court* (1993) 17 Cal.App.4th 958, 965, 22 Cal.Rptr.2d 527.) “Like any other officer of the court (receiver, conservator, referee, etc.), a guardian ad litem is subject to court supervision. Should a guardian ad litem take an action inimical to the legitimate interests of the [incompetent person], the court retains the supervisory authority to rescind or modify the action taken.” (*Regency Health Services, Inc. v. Superior Court* (1998) 64 Cal.App.4th 1496, 1502, 76 Cal.Rptr.2d 95.) Thus the role of the guardian

ad litem and his or her ongoing relationship to the court distinguishes the order appointing him or her from an order or judgment in a case determining or disposing of a disputed matter or a party's rights, as in *Ford*.

****788** [36] [37] Moreover, a valid order made ex parte may be vacated for cause based on a showing that there was mistake, inadvertence, or fraud in the making of the original order. (*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1069, 283 Cal.Rptr. 917; *Sheldon v. Superior Court* (1941) 42 Cal.App.2d 406, 408, 108 P.2d 945.) And a successor judge may review an interlocutory ruling of another judge when the facts have changed or when the judge has considered further evidence and law. (*People v. Riva* (2003) 112 Cal.App.4th 981, 992–993, 5 Cal.Rptr.3d 649; *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 706, 191 Cal.Rptr. 229.) From what we can tell from the record, either of these circumstances may have been invoked when two judges other than those who had appointed Elsie as Nancy's guardian ad litem vacated those prior orders.

[38] As noted, while the entire action will be reinstated by virtue of our reversal of the dismissal, Nancy **Golin**, as a conservatee, cannot pursue claims or causes of action on her own behalf and she can only do so either through her conservator or a duly appointed guardian ad litem.

***645 DISPOSITION**

[39] The order of dismissal is reversed.³³

WE CONCUR: RUSHING, P.J., and McADAMS, J.

Parallel Citations

190 Cal.App.4th 616, 10 Cal. Daily Op. Serv. 14,871, 10 Cal. Daily Op. Serv. 16,019, 2010 Daily Journal D.A.R. 17,958, 2010 Daily Journal D.A.R. 19,274

Footnotes

- 1 Further statutory references are to the Code of Civil Procedure unless otherwise indicated.
- 2 As there has been no determination of the historical facts, we take them from the allegations of the first amended complaint and other filings in the record, doing so for background purposes only and with no-law-of-the-case effect.
- 3 We sometimes refer to all three individual **Golins** by their first names. We do so for ease of reference and mean no disrespect.
- 4 Before the trial, the **Golins** had apparently challenged Judge Thomas Edwards under sections 170.1 and 170.6. Then, they challenged Judge William Martin under section 170.6 but withdrew that challenge in the face of its imminent denial. Elsie **Golin** renewed the challenge to Judge Martin under section 170.6 after the matter was argued and submitted and the challenge was denied as untimely. The **Golins** also attempted to disqualify attorney Malorie Street from the Office of the Public Defender, who had been appointed to represent Nancy **Golin's** interests, and attorney Nancy Johnson, who represented the San Andreas Regional Center. Those attempts were unsuccessful, the court finding that both counsel had “acted professionally, ethically, and in the best interests of their respective clients.” The court further found “no evidence of personal animus or bias against [the **Golins**]. Counsel's advocacy of positions contrary to those of [the **Golins**] does not support the extraordinary allegations made by [the **Golins**] against [counsel]. The written papers submitted to the Court during trial and pretrial, as well as the repeated arguments of both [the **Golins**], demonstrate a worldview of deep distrust and suspicion of authority, especially governmental authority. Notably, [the **Golins**] also vigorously complain about the judgment, actions, and fairness of the Court's Probate Investigators, prior [j]udges assigned to their matters—indeed all the judges of this county (‘kangaroo court’ referring to the dependency court, ‘like political prisoners in a banana republic’—Mrs. **Golin**), various police departments (including the Palo Alto Police Department), various physicians and health care entities (including the Stanford Medical Center and its staff), SARC, APS, the District Attorney's Office, Santa Clara County Counsel, the State Department of Developmental Services and various state licensing boards. [The **Golins**] are extremely suspicious of the actions of many of the governmental agencies and allege a conspiracy intended to deprive them of their rights and to disadvantage them. [The **Golins**] accuse Ms. Street of conspiring with the District Attorney's Office to prosecute [them] on various charges so that some advantage might obtain in this proceeding. The Court notes that the **Golins** have sought, and are seeking, relief in Federal Court from their perceived disadvantages caused by these various governmental entities.”
- 5 The **Golins** appealed from the order but their appeal was dismissed under former Rule 17(a) of the California Rules of Court for the appellants' failure to timely file their opening brief. (See now rule 8.220(a) of the California Rules of Court.)
- 6 Their filed complaint was apparently not the same document that was served on the defendants purportedly as the complaint. Accordingly, the **Golins** were permitted leave to file the correct version of the complaint, which resulted in the first amended complaint.

7 The court cited *Rooker v. Fidelity Trust Co.* (1923) 263 U.S. 413, 415–416, 44 S.Ct. 149, 68 L.Ed. 362 and *D.C. Court of Appeals v. Feldman* (1983) 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (“*Rooker–Feldman doctrine*”) as well as *Worldwide Church of God v. McNair* (9th Cir.1986) 805 F.2d 888, 891 and *Dubinka v. Judges of Superior Court* (9th Cir.1994) 23 F.3d 218, 221 in support of its conclusion that a federal court lacks authority to review a final state court judicial decision even when the challenge potentially involves federal constitutional issues and when a “federal claim is ‘inextricably intertwined’ with the merits of the state-court decision.” The court assessed that the claims made on Nancy’s behalf in the district court were all related to the question of who had the lawful right to her custody and care—the precise issue decided by the probate court in the conservatorship proceeding. And the court rejected the **Golins’** arguments that they were not seeking to relitigate issues tried in the probate court but instead were merely seeking redress for wrongs arising from common facts. The court also rested its decision on abstention under the *Younger* doctrine (*Younger v. Harris* (1971) 401 U.S. 37, 42, 91 S.Ct. 746, 27 L.Ed.2d 669; *Middlesex Ethics Comm. v. Garden State Bar Assn.* (1982) 457 U.S. 423, 431, 102 S.Ct. 2515, 73 L.Ed.2d 116; *Huffman v. Pursue, Ltd.* (1975) 420 U.S. 592, 604, 95 S.Ct. 1200, 43 L.Ed.2d 482), which confirmed Congress’s intent to permit state courts to try cases free from federal-court interference and under appropriate circumstances, bars the prosecution of a concurrent federal action. Abstention is warranted where the state proceeding is ongoing (as the court considered the conservatorship proceedings with continuing jurisdiction over Nancy to be); implicates important state interests; and provides the plaintiff an adequate opportunity to litigate federal claims. (*The San Remo Hotel v. City and County of San Francisco* (9th Cir.1998) 145 F.3d 1095, 1103.) If the *Younger* doctrine applies, the concurrent federal action must be dismissed, as the action was here. (*Delta Dental Plan of California, Inc. v. Mendoza* (9th Cir.1998) 139 F.3d 1289, 1294.)

8 Attorney Wallace’s application for appointment as counsel pro hac vice was initially denied because there was no California attorney associated as attorney of record. That defect was corrected at some point with attorney Geoffrey V. White from San Francisco later appearing on plaintiffs’ pleadings as local counsel of record. Attorney Wallace was thereafter appointed as counsel pro hac vice.

9 Defendants (capacities roughly as described in complaint) who are also respondents here are the City of Palo Alto; Lori Kratzer, City of Palo Alto Police Department; City of Palo Alto Police Department; Clifford B. Allenby, former Director of the California Department of Developmental Services; Terri Delgadillo, Director of the California Department of Developmental Services; H. Dean Stiles, Office of Legal Affairs, California Department of Developmental Services; S. Kimberly Belshé, Secretary, California Dept. of Health and Human Services; County of Santa Clara; Santa Clara County Board of Supervisors; Jamie Buckmaster, Santa Clara County Adult Protective Services; Mary Greenwood, Santa Clara County Public Defender; Malorie M. Street, Deputy Public Defender; Jacqueline Duong, Office of the County Counsel; Randy Hey, Deputy District Attorney; San Andreas Regional Center, Inc.; Roselily and Anselmo Talla, dba Talla House; Talla Home Care; and Stanford Hospital and Clinics. There are other named defendants but they may have been dismissed from the action before the court’s order of dismissal on appeal here.

10 Specifically, the causes of action were labeled “Denial of Freedom from Unreasonable Personal Seizures and Warrantless Searches” (first cause of action); “Denial of Natural Right of Familial Association, Loss of Consortium, Free Speech” (second cause of action); “Denial of Due Process, Fifth Amendment extended to States by Fourteenth Amendment—Constitutional Tort [section] 1983” (third cause of action); “Fraud, Forgery, Misrepresentation—Civil Tort” (fourth cause of action); “Obstruction of Justice, Concealment of Evidence, Concealment of Witnesses, Suborning of Perjury, Witness Tampering, Corruption” (fifth cause of action); “Common Law Conspiracy of State Officials to Deny Civil Rights” (sixth cause of action); “Negligent and Intentional Infliction of Emotional Distress, Eight[h] Amendment Cruel and Unusual Punishment” (seventh cause of action); “Breach of Statutory Duty [arising under the] Welfare and Institutions Code” (eighth cause of action); “Breach of Title II, Americans with Disabilities Act (ADA) (42 U.S.C. § 12132)—Statutory Tort adopted by state Unruh Act, California Civil Code [section] 1801 et seq [.]” (ninth cause of action); “Negligence and Indifference to Medical Care, Breach of Fiduciary Duty” (tenth cause of action); “Attorney Malpractice—Failure of Duty to Client, Advocating Chemical Assault, Sixth Amendment Denial of Representation, Fraud Upon Courts, Concealment of Evidence, Obstruction of Discovery, Denial of Due Process, Wrongful Imprisonment, Conspiracy” (eleventh cause of action); “Abduction, Wrongful Imprisonment—Tort Claim” (twelfth cause of action); “Slander and Defamation of Character” (thirteenth cause of action); “Malicious Prosecution—Tort Claim” (fourteenth cause of action); “Wrongful Termination—Tort Claim” (fifteenth cause of action); “Chemical Assault and Battery—Tort” (sixteenth cause of action); “Violation of Elder Abuse and Dependent Adult Civil Protection Act [Welfare and Institutions Code sections 15657–15657.5]” (seventeenth cause of action).

11 The conclusion that all judges of the Superior Court of Santa Clara County were required to recuse themselves from this case as a result of Jacqueline Duong’s judicial appointment was apparently reached collectively by the entire court. But the record does not reveal how the court reached this conclusion or on what particular basis.

12 At the hearing, attorney David Beauvais, who represents appellants on appeal, appeared specially on behalf of Elsie and Nancy Golin, his first appearance in the case.

13 The document showed that David Beauvais continued to appear specially for Elsie and Nancy Golin, as he did through the conclusion of the case in the trial court.

- 14 Although not set out here in detail, the record is also replete with numerous filings and other applications for ex parte relief by the **Golins**, many of which were outside of applicable filing deadlines, page limitations, or other regular procedural requirements.
- 15 Although the filing of the vexatious litigant motion otherwise stayed the action under section 391.6, the **Golins** thereafter filed a motion to set aside as void the previous two orders that had removed Elsie **Golin** as Nancy's guardian ad litem. The basis for the motion was that the two prior orders appointing Elsie, both of which had been sought ex parte and without notice to the defendants, were set aside by judges other than those who had issued the orders, allegedly violating the principle that a judge of one department may not overrule a judge of another department and resulting in void orders. The result, the **Golins** contend here as they did below, is that Elsie remains Nancy's guardian ad litem.
- 16 The third parties were employees of Fed Ex/Kinko's in Palo Alto, where the **Golins** apparently had copied documents, and their business cards were available at that establishment. The third parties testified that the signatures on proofs of service bearing their names were not theirs and that they had never signed or served such documents for the **Golins**. And counsel for the defendants pointed out that they regularly did not receive documents served by the **Golins** on time or as represented as having been served by mail on a certain date.
- 17 In their brief on appeal, respondents list 85 documents filed by the **Golins** in the case that respondents contend supported the trial court's "finding of frivolousness and vexatiousness under" section 391, subdivision (b)(3). Included in the list are the **Golins'** oppositions to respondents' various motions and demurrers, substitutions of attorney and an association of counsel, and the **Golins'** designations of the record on appeal, none of which could be considered frivolous for purposes of the vexatious litigant determination.
- 18 The court also later said that it had considered the forged proofs of service to reach its conclusion that the **Golins** were abusing court processes by their actions rather than just pursuing meritorious claims.
- 19 At the hearing, the **Golins** attempted to distinguish claims made on their behalf from those made on Nancy's behalf, which they argued should not be dismissed as Nancy had not been designated a vexatious litigant subject to the bond requirement. In an attempt to save her claims from dismissal, the **Golins** brought two people to the hearing, either of whom they contended were suitable and qualified to act as Nancy's guardian ad litem in the case. But the court rejected the **Golins'** proposal, noting that Nancy could assert her own claims at any time through a guardian ad litem properly appointed by the probate court and that in this case, she was not a proper party because there was no authority authorizing the **Golins** to assert claims on her behalf. Dismissal of the entire action under the vexatious litigant statutes was therefore appropriate in the court's view, including those claims brought on Nancy's behalf. The dismissal left unresolved the defendants' multiple pending motions challenging the first amended complaint.
- 20 A "vexatious litigant" is described at subsection (b) of section 391, a definitional section, as a person who "does any of the following: [¶] (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. [¶] (2) After litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined. [¶] (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay. [¶] (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence."
- 21 Section 391.3 provides: "If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix."
- 22 Section 391.1 provides: "In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant."
- 23 On February 29, 2008, the court entered judgment but because the December 11, 2007 order of dismissal was itself appealable as a final judgment, it was not necessary for the **Golins** to separately appeal from the later judgment.
- 24 The court's written order also concluded that the **Golins** were vexatious litigants under section 391, subdivision (b)(2) but in concluding that the court did not abuse its discretion in finding them vexatious under section 391, subdivision (b)(3), we need not address this alternative basis.

- 25 Attorney David Beauvais appeared specially for Elsie **Golin** beginning on or about September 15, 2007, through dismissal of the action. We do not include this representation for purposes of our analysis because Beauvais never formally became counsel of record by either substitution of attorney or association of counsel.
- 26 Our own review of the record suggests that unlike their appellate briefs, many documents filed jointly for the **Golins** in the trial court were not prepared by a lawyer. Their regular flouting of applicable rules and deadlines with respect to their joint filings also lends credence to the suggestion that the **Golins'** litigation activities were not being adequately supervised or controlled by an attorney.
- 27 Respondents do not discuss attorney Shapiro's representation of Elsie but we note that this lasted roughly just two months in the 20-month lifespan of this case in the trial court.
- 28 As noted, the court also later said that it had considered the forged proofs of service to reach its conclusion that the **Golins** were abusing court processes.
- 29 The vexatious litigant statutes do not define "frivolous" but we note that under section 128.5, subdivision (b)(2), this term is defined as "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party." In reference to the vexatious litigant statutes, "frivolous" has also been described as a " 'flagrant abuse of the system,' " having " 'no reasonable probability of success,' " or lacking " 'reasonable or probable cause or excuse.' " (*Morton v. Wagner*, *supra*. 156 Cal.App.4th at p. 972, 67 Cal.Rptr.3d 818.)
- 30 While our analysis does not depend on it, our conclusion about the **Golins'** frivolous use of judicial challenges as a tactic in this case is supported by what appears to be their frequent challenges to judges in other cases that are referenced in this record. They apparently challenged Judge Edwards in the conservatorship proceeding under sections 170.1 and 170.6 and then twice unsuccessfully challenged Judge Martin in the same proceeding under section 170.6. And they also three times unsuccessfully challenged U.S. District Court Judge William Alsup's ability to be unbiased and to decide the federal action according to law, conduct that his order determined to be frivolous.
- 31 Such a showing might be made in a given case based on principles of res judicata or collateral estoppel. " 'The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties involving the same cause of action. A prior judgment for the plaintiff results in a merger and supersedes the new action by a right of action on the judgment. A prior judgment for the defendant on the same cause of action is a complete bar to the new action. [Citation.] Collateral estoppel ... involves a second action between the same parties on a different cause of action. The first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action. [Citation.]' [Citation.]' [Citation.]" (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 866–867, 114 Cal.Rptr.3d 241, 237 P.3d 565.) Respondents did not attempt to show preclusion under either theory by demonstrating that the respective elements of either applied.
- 32 Our decision should not be read to state that the moving parties could not do so, just that they did not.
- 33 We decline to transfer the action to another county as requested by the **Golins**. We accordingly deny the **Golins'** motion for judicial notice of documents relating to the Assigned Judges Program as relevant to their request. We leave such a request to the trial court to determine in the first instance on proper motion for relief.

Exhibit 4

27 Cal.App.4th 1139
Court of Appeal, Second
District, Division 3, California.

In re **MARRIAGE OF** Kathleen
McDonald and Harold **Caballero**.
Kathleen **CABALLERO**, Petitioner and Appellant,
v.
Harold **CABALLERO**, Respondent.

No. B076383. | Aug. 25, 1994. | As
Modified on Denial of Rehearing Sept. 26, 1994.

Incapacitated wife's son, as attorney in fact, brought action on wife's behalf against husband for **marriage** dissolution or for separate maintenance. The Superior Court, Los Angeles County, No. BD1058, Michael Pirosh, J., dismissed action, and attorney in fact appealed. The Court of Appeal, Croskey, J., held that: (1) trial court should not have summarily refused request for appointment of guardian ad litem, and (2) Family Court, rather than Probate Court, was correct forum in which to resolve wife's support and property rights.

Reversed and remanded.

West Headnotes (10)

[1] **Mental Health**



for appointment

Appointment of guardian ad litem may be made on an *ex parte* application. West's Ann.Cal.C.C.P. § 373(c).

1 Cases that cite this headnote

[2] **Mental Health**



and qualification

Trial court has discretion to accept or deny application for appointment of guardian ad litem; absent a conflict of interest, however, appointment is usually made on application only

and involves little exercise of discretion. West's Ann.Cal.C.C.P. §§ 372, 373.

4 Cases that cite this headnote

[3] **Mental Health**



Review

Order appointing guardian ad litem or revoking appointment is not appealable. West's Ann.Cal.C.C.P. § 373(c).

1 Cases that cite this headnote

[4] **Mental Health**



Powers,

duties, and liabilities

"Guardian ad litem" is not a party to the action, but rather, is merely party's representative and an officer of the court; he is like an agent with limited powers, and his duties are essentially ministerial. West's Ann.Cal.C.C.P. § 373(c).

2 Cases that cite this headnote

[5] **Mental Health**



Powers,

duties, and liabilities

Guardian ad litem's role is more than attorney's but less than a party's in that guardian may make tactical and even fundamental decisions affecting the litigation but always with interest of guardian's charge in mind; specifically, guardian may not compromise fundamental rights, including the right to trial, without some countervailing and significant benefit. West's Ann.Cal.C.C.P. § 373(c).

3 Cases that cite this headnote

Proceedings

Eligibility
[6]

Mental Health



Time

for appointment and conditions precedent

Appointment of guardian ad litem for incompetent person may be made whenever need

for one is brought to the court's attention. West's Ann.Cal.C.C.P. § 373(c).

2 Cases that cite this headnote

[7] **Mental Health**



for appointment and conditions precedent

Trial court could not summarily deny request for appointment of guardian ad litem to represent incompetent petitioner in action for **marriage** dissolution even though request was made after summons and petition were filed. West's Ann.Cal.C.C.P. § 373(c).

2 Cases that cite this headnote

[8] **Mental Health**



and qualification

Although durable power of attorney did not, by itself, authorize recipient to file, on incapacitated grantor's behalf, petition for dissolution of **marriage** or for separate maintenance, it created presumption that recipient should be appointed as grantor's guardian ad litem. West's Ann.Cal.C.C.P. § 373(c); West's Ann.Cal.Civ.Code § 2321.

2 Cases that cite this headnote

[9] **Attorney and Client**



of others in general

Attorney in fact may not act as attorney at law on behalf of principal, even though principal could appear in propria persona. West's Ann.Cal.Civ.Code § 2321.

7 Cases that cite this headnote

[10] **Courts**



infants and incompetents

Mental Health



of inquiry and matters considered

Family Court, rather than Probate Court, was appropriate forum for resolving incapacitated spouse's property and support rights; remedies which spouse could not obtain in conservatorship proceeding were available in action for dissolution of **marriage** or for separate maintenance. West's Ann.Cal.Civ.Code §§ 4357, 4801 (Repealed).

2 Cases that cite this headnote

Time

Attorneys and Law Firms

****47 *1142** Lurvey & Shapiro, Ira H. Lurvey and Judith Salkow Shapiro, Los Angeles, for appellant.

Eligibility

Steven Sindell, Santa Monica, Robert Gaston and Edward J. Horowitz, Los Angeles, for respondent.

CROSKEY, Associate Justice.

INTRODUCTION

Appellant Kathleen McDonald **Caballero** (Kathleen) appeals from the minute order of the Family Law Division of the Superior Court granting the ***1143** motion of Kathleen's husband, Harold **Caballero** (Harold), to quash service of summons of Kathleen's petition for dissolution or legal separation and dismissing the action. The petition was filed by Kathleen's son, Doyle D. McDonald (Doyle), in his capacity as Kathleen's attorney-in-fact under the general durable power of attorney given by Kathleen to Doyle in 1990.

Representation

While we agree that Doyle's status as Kathleen's attorney-in-fact, and her nominee for appointment as her conservator, did not give him the legal authority of a guardian ad litem, it did establish that he was *presumptively* entitled to be appointed as such guardian. It was therefore error for the Family Law court to deny his request for such appointment and to dismiss the action on the ground it did not have jurisdiction. We reverse and remand with instructions to reconsider Doyle's appointment as Kathleen's guardian ad litem and to address remedies available to her under the Family Law Act.

Guardianship

Scope

FACTUAL AND PROCEDURAL BACKGROUND

Kathleen and Harold were married October 15, 1959. Both were previously widowed. Kathleen had four surviving children from her first marriage to Doyle McDonald: two daughters and two sons. Harold had two daughters from his first marriage.

On September 18, 1990, Kathleen, represented by counsel, executed a Statutory Short Form Power of Attorney, appointing Doyle her attorney-in-fact. (Civ.Code, § 2475, et seq.) He was granted all the powers designated in the form. The only special provision and limitation was that he not have any power to change the dispositive provisions of any estate planning documents of Kathleen. Kathleen also executed a Durable Power of Attorney for Health (Civ.Code, § 2430, et seq.), designating Doyle as her agent to make health care decisions for her. Both documents also nominated Doyle as her conservator in the event a court decides she is unable properly to provide for her personal needs for physical health, food, clothing or shelter or decides one should be appointed to manage her financial affairs and property.

A petition for dissolution of the Caballeros' marriage was filed on March 11, 1993. Doyle executed the petition on behalf of Kathleen as her attorney-in-fact. The petition was filed by an attorney.

In support of the petition, Doyle declared his 79-year-old mother suffered from Alzheimer's Disease and he had been looking after her welfare "virtually daily since she was thrown out by my stepfather, Harold ("Cabby") Caballero...." The couple had acquired an estate estimated to have a net worth in excess of \$10-\$15 million composed of real estate and a mobile home park business known as the Wilshire Ranch Co., a residence in *1144 Pacific Palisades with equity value in excess of \$1.6 million net of furnishings and securities and personal property, all of which was now solely under the management and control of Harold. Doyle indicated he believed Harold had treated his mother **48 unfairly in various financial transactions and declared Harold was now claiming there was no community property and Kathleen owned nothing except a few stocks in her name and one-half interest in the residence. Kathleen's health had begun to fail three to five years earlier and Harold's attitude toward her became progressively more hostile. About a year ago, Harold ordered Kathleen to leave the house and she was

placed in Marycrest Manor, a residential care facility. Harold paid at least a portion of her bills until January 1993 when he announced he was no longer going to pay for her care and medical bills. Doyle requested attorney fees and support as well as a determination of property rights.

The declaration of attorney Ira Lurvey, in support of Kathleen's petition, stated the need for an award of \$75,000 for attorney fees pendente lite and an advance of \$50,000 on account of anticipated accountants' and appraiser's fees and costs. He expressed the need for a complete tracing of all assets acquired by Harold during the past 34 years of marriage, in light of Harold's statement there is no community property and his stated position that he has no duty to support Kathleen or to pay her medical bills. Lurvey represented that he was a certified specialist in Family Law and his partner, Ms. Shapiro, was former chair of the Family Law Section of the County and had lectured and written widely on family law.

Harold filed a motion to quash service of summons. He argued Doyle was not authorized to bring a dissolution action on behalf of Kathleen under California law and that an agent with financial interest in the matter, as Doyle was, would be barred from doing so. Harold declared he had "generously and fairly provided for my wife, her five children and my own two daughters." He asserted Doyle had a "significant conflict of interest," stating he personally transferred \$152,500 to Doyle about a year earlier on behalf of his mother and Doyle borrowed \$25,000 from her almost three years ago and had not repaid any of it. Kathleen was a devoted Catholic and Harold did not believe she was seeking divorce or was even aware Doyle had filed a petition for dissolution.

On or about April 15, 1993, Harold filed in Probate Court an ex parte petition for the appointment of legal counsel, selected from the Probate Volunteer Panel, for Kathleen and a petition for temporary and permanent *1145 conservatorship of the person and estate of Kathleen.¹ The petition represented there was an immediate need for a conservator of the person because of the pending dissolution action, instituted by Doyle for the purpose of obtaining a property settlement, and that Kathleen, as a devout Catholic, would not consider divorce.

The Probate Court appointed Frederick Seymour from the Volunteer Attorney Panel, to determine whether Kathleen required a conservator. Seymour later reported that no conservator was required and Kathleen should be permitted to pursue her claims against Harold in the Family Law court.

Before the hearing on Harold's motion to quash in the Family Law court, Kathleen's attorneys noticed the deposition of Harold. Harold sought a protective order to stay the deposition and other discovery proceedings until Harold's motion to quash had been heard. Kathleen's attorneys then sought an order restraining Harold from interfering with the Family Court proceedings. They pointed out Harold had filed a "frivolous" motion to quash service, continued Kathleen's O.S.C. for support, used the delay to bring ex parte a request in the Probate Court that he be appointed conservator for Kathleen, asked the court to appoint an attorney for Kathleen, without advising the court that she had attorneys, refused to appear for deposition and started direct interference against the commercial business of Doyle. Harold reportedly sent Doyle a three-day notice to pay rent or quit to evict the family graphics business from the premises alleged to be community property and where Doyle has conducted business for at least the past 10 years.

****49** The Family Law court denied Harold's request for a protective order and ordered him to appear for deposition limited to matters related to the motion to quash. The court granted Kathleen's request for an order restraining Harold from transferring, hypothecating or disposing of any property or in any way interfering with the community property rights of Kathleen. The trial court denied Kathleen's request for further restraining order to the extent they would prevent Harold from proceeding with otherwise lawful legal actions. The award of discovery sanctions was continued to the scheduled hearing on the O.S.C. for attorney fees.

Harold appeared for the ordered deposition, but refused to answer any questions of substance. Kathleen sought sanctions.

The Family Law court heard all pending matters on May 19, 1993. Kathleen's petition had been amended to seek legal separation and Harold had ***1146** renewed his motion to quash in connection with the amended petition. Applying *In re Marriage of Higgason* (1973) 10 Cal.3d 476, 110 Cal.Rptr. 897, 516 P.2d 289, and Code of Civil Procedure section 372, the court granted Harold's motion to quash and denied Kathleen's motion for the court to deem itself as the probate court for determination of legal guardian or conservator. The Family Law court found Doyle lacked standing to bring the proceedings for legal separation or dissolution and ordered the action dismissed. Kathleen's attorney filed a notice of appeal on May 25, 1993.

Two days later, on May 27, 1993, Doyle filed a petition in the Probate Court to be appointed Kathleen's conservator, explaining that all of Kathleen's property was either in an inter vivos trust, for which Doyle is the trustee, or was community property under the management and control of Harold. The purpose of the requested appointment was to reinstate the Family Law action in order that Kathleen could obtain spousal support and maintenance and be awarded other marital rights.

The Probate Court denied Harold's petition to be appointed conservator and appointed Frumeh Labow as temporary conservator of Kathleen's estate, pointing out that the only thing the temporary conservator would be able to do would be to institute proceedings attempting to determine whether there has been misappropriation of Kathleen's estate by Doyle. The Probate Court expressed its opinion that Kathleen would be protected by having someone "totally adverse to Harold Caballero" represent Kathleen in Family Law proceedings. Labow opposed Doyle's petition to be appointed conservator, stating it may not be in Kathleen's best interest due to serious allegations of conflicts of interest. Harold also opposed Doyle's petition. On June 8, 1993, in spite of the express command of Kathleen's durable power of attorney, the Probate Court denied Doyle's petition and appointed Labow as temporary conservator of the person as well as of the estate.

Kathleen's attorneys petitioned the Court of Appeal for a writ of mandate, prohibition or other extraordinary relief from the Probate Court's order of June 8, contending error by the refusal without cause to honor the nomination of Doyle as Kathleen's conservator and "the refusal to permit Doyle to resume a Family Law action" for Kathleen, causing her irreparable harm because it was only through a Family Law action that she could receive certain remedies. Division Four of this court summarily denied the petition.²

In her capacity as temporary conservator of the person and the estate, Labow in October 1993 filed a petition which alleged that a portion if not ***1147** all of Harold's interest in Wilshire Ranch Company (WRC) was community property and sought to void certain sales and gifts made by Harold to WRC, his children and family related trusts. In response, it was asserted that Kathleen and Harold had entered into an oral agreement prior to **marriage** in which WRC was to remain Harold's separate property and the Rogers and McDonald Publishers, Inc. (R & M) was to remain Kathleen's separate property.

Also, it was alleged Kathleen knew of **50 and consented to the gifts of a portion of Harold's interest in WRC.

In March 1994, after conducting some discovery, including the depositions of Harold, Doyle and others, Labow petitioned for approval of a settlement agreement which purported to resolve the community property question. The petition alleged that Labow had concluded there was "overwhelming" evidence to establish WRC was Harold's separate property. According to Harold, at the time of their marriage in 1958, Kathleen's family owned R & M and Harold's owned WRC. R & M was a more valuable company than WRC. Harold's will, executed just before their marriage, left only his personal belongings to Kathleen, "knowing she is otherwise adequately provided for." Harold showed Kathleen the will shortly after they were married. Neither expressed any dissatisfaction with their oral agreement. Kathleen signed a consent to an amendment to the WRC partnership agreement in 1964 so there would be no issue of commingling. Kathleen attended a meeting at the law offices of Harold's counsel in which the gifts and sale of most of his interest in WRC were discussed. Marion Montgomery, an old friend of Kathleen, testified at her deposition that in a conversation in about 1977 Kathleen advised her of the agreement Harold and she had reached concerning the two companies. Labow concluded it was in the best interest of the conservatorship estate that the Probate Court approve the settlement.³

Doyle and his sister Katie McDonald Grimditch objected to the proposed settlement agreement, for the reason that the issues purported to be settled by Labow's petition were among the same issues to be adjudicated by the Family Law court should Kathleen prevail in the instant appeal. They contended, even if the allegations of Labow's petition were true, a dismissal of that petition would better achieve the result of halting further investigation expenses to Kathleen which was the stated purpose of the proposed settlement; moreover, it would do so without causing irrevocable damage to Kathleen's marital property and support rights. However, at the hearing on the petition, it was determined that the issue of community property had not *1148 been litigated. The Probate Court then set trial of the limited issue of whether the settlement should be approved for September 1, 1994.⁴

CONTENTIONS

Doyle, on behalf of Kathleen, contends that (1) adoption of the Durable Power of Attorney Act substituted an attorney in fact for a conservator for purposes of filing a dissolution petition on Kathleen's behalf; (2) it is a denial of equal protection to require an incompetent spouse to obtain a conservator to bring a family law action, but to allow a competent spouse to initiate an action against an incompetent without a conservator; (3) only under the Family Law Act can Kathleen's marital rights to a division of community property, spousal support and litigation assistance orders be protected; and (4) there was no jurisdictional issue justifying the trial court's order of dismissal.

Harold contends the Family Law court correctly applied controlling authorities in dismissing Kathleen's action as the court had no jurisdiction to proceed.

We discuss each of these contentions, although in a slightly different organizational context than that presented by the parties.

DISCUSSION

1. The Trial Court Should Have Acted Upon The Request To Appoint A Guardian Ad Litem To Prosecute The Separate Maintenance Proceeding

Except in nullity proceedings, the only persons permitted to be *parties* to a proceeding for dissolution or legal separation are the husband and wife. (**51 Cal.Rules of Court, rule 1211(a).) An insane or incompetent spouse must appear through a guardian or a conservator of the estate or a guardian ad litem appointed by the court in which the action is pending. (Code Civ.Proc., § 372.) An "incompetent person" includes " 'a person for whom a conservator may be appointed.' " ⁵ (*Ibid.*)

[1] [2] [3] A guardian ad litem may be appointed upon application of a relative or friend, or any other party to the proceeding, or on the court's own *1149 motion. (Code Civ.Proc., § 373, subd. (c).) The appointment may be made on an *ex parte* application. (*Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 118 Cal.Rptr. 21, 529 P.2d 53.) "A trial court has discretion to accept or deny an application for appointment of a guardian ad litem (see *D.G. v. Superior Court* (1979) 100 Cal.App.3d 535 [161 Cal.Rptr. 117]). In the absence of a conflict of interest, however, the appointment is usually made on application only and involves little exercise of discretion. (See Code Civ.Proc., §§ 372, 373.)" (*J.W. v.*

Superior Court (1993) 17 Cal.App.4th 958, 964. fn. 5, 22 Cal.Rptr.2d 527.) An order appointing a guardian ad litem or revoking an appointment is not appealable. (*In re Hathaway* (1896) 111 Cal. 270, 271, 43 P. 754; *Estate of Corotto* (1954) 125 Cal.App.2d 314, 324, 270 P.2d 498.)

[4] "A guardian ad litem is not a party to the action, but merely a party's representative [citation], an officer of the court [citation]. ' "He is like an agent with limited powers." ' [Citation.] 'The duties of a guardian ad litem are essentially ministerial.' [Citation.]

".....

[5] "... [A] guardian ad litem's role is more than an attorney's but less than a party's. The guardian may make tactical and even fundamental decisions affecting the litigation but always with the interest of the guardian's charge in mind. Specifically, the guardian may not compromise fundamental rights, including the right to trial, without some countervailing and significant benefit." (*In re Christina B.* (1993) 19 Cal.App.4th 1441, 1453, 1454, 23 Cal.Rptr.2d 918 [holding juvenile court erred in accepting guardian ad litem's waiver of mother's trial rights].)

[6] [7] It has been suggested that the time for the appointment on behalf of an insane or incompetent person pursuant to Code of Civil Procedure section 373, subdivision (c), "should no doubt be the same as that followed in connection with minors. [Citations.]" (4 Witkin, Cal. Procedure (3d ed.1985) Pleading § 62, p. 101.) We disagree. In the case of a minor, the appointment of a guardian must be made before the summons is issued. (Code Civ.Proc., § 373, subd. (a).) However, in the case of an insane or incompetent person, it appears incumbent upon the court to appoint a guardian ad litem *whenever* the need for one is brought to the court's attention. In the instant case, the appointment of a guardian ad litem should have been considered as soon as an objection was made to Doyle's capacity *1150 as attorney in fact to maintain the Family Law action on behalf of Kathleen. The summary denial of Doyle's request for such an appointment was improper.

In re Marriage of Higgason, supra. 10 Cal.3d 476, 110 Cal.Rptr. 897, 516 P.2d 289, overruled on other grounds by *In re Marriage of Dawley* (1976) 17 Cal.3d 342, 352, 131 Cal.Rptr. 3, 551 P.2d 323, held a petition for dissolution of marriage may be brought on behalf of a spouse, who is under conservatorship, by and through the spouse's guardian

ad litem. (*Id.*, 10 Cal.3d at p. 483, 110 Cal.Rptr. 897, 516 P.2d 289.) The wife in *Higgason*, was 73 years old and the husband was 48. Upon her own petition, the wife had **52 been adjudicated an incompetent person two weeks after their marriage and a conservator, a commercial bank, had been appointed. The court held the guardian ad litem, her adopted daughter, could file a petition for dissolution on behalf of the wife, "provided it is established that the spouse is capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so."⁶ (*Ibid.*)

Pulos v. Pulos (1956) 140 Cal.App.2d 913, 295 P.2d 907, held an incompetent spouse may sue for separate maintenance through a guardian ad litem.⁷ Kathleen's capacity to express her wishes is in dispute. However, it appears that Kathleen, even if in fact incapable of expressing a knowing and informed desire to terminate her marriage, may at the very least obtain a legal separation by means of a guardian ad litem.⁸ *In re Higgason* makes it clear that the guardian ad litem does *not* have to be the conservator of the estate appointed by the Probate Court but may be a different person. In this case, as we discuss below, Doyle was presumptively the person to receive such appointment.

***1151 2. A Power Of Attorney Does Not Authorize A Person To File A Petition On Behalf Of The Principal But At Least Creates a Presumption in Favor of Appointment as Guardian Ad Litem.**

[8] A power of attorney is a device available to a person to empower another to act on his or her behalf. The durable power of attorney remains effective notwithstanding the subsequent incapacity of the principal. Generally, powers of attorney are strictly construed. (Civ.Code. § 2321.)

In its recommendation relating to the Uniform Durable Power of Attorney Act, the California Law Revision Commission explained the concept of the durable power of attorney was a recent development that avoided the serious practical problems created by the old rule that the incapacity of the principal to contract terminates a power of attorney. It "is a useful device since it avoids the need to establish a trust for a person of modest means and the need for a costly court-supervised conservatorship in the event of the person's future incapacity." (Cal.Law Revision Commission, Recommendation Relating to Uniform Durable Power of Attorney Act (Dec. 1980) at p. 357.)

The Commission pointed out the incapacitated principal is protected by the statutory provisions which allow the principal or a relative, friend, or interested person to petition for the appointment of a conservator of the estate (Prob.Code. § 1820) and, if a conservator is appointed, the conservator along with other interested persons (Civ.Code. § 2411), are authorized to petition the Probate Court to terminate or amend the power of the attorney in fact. (Civ.Code, § 2412, subd. (d).)

[9] Despite broad statutory language of the power of attorney with respect to claims and litigation, the attorney in fact may not act as an attorney at law on behalf of his principal, even though the principal could appear in propria persona. (*Drake v. Superior Court* (1994) 21 Cal.App.4th 1826, 1831, 26 Cal.Rptr.2d 829; **53 *J.W. v. Superior Court, supra*, 17 Cal.App.4th at p. 968, 22 Cal.Rptr.2d 527.)

“Long before passage of the Power of Attorney Act, the law distinguished between an attorney in fact and an attorney at law and emphasized that a power of attorney is not a vehicle which authorizes an attorney in fact to act as an attorney at law. [Citation.] ... [¶] Nothing in the Power of Attorney Act changes this rule. As the California Law Revision Commission recognized, the authority of attorneys in fact under section 2494 is restricted—it is ‘subject to conditions of fact and law that exist outside this chapter.’ (Recommendation Relating to Uniform Statutory Form Power of Attorney *1152 Act (Dec. 1989) 20 Cal.Law Revision Com.Rep. (1990) p. 401.)” (*Drake v. Superior Court, supra*, 21 Cal.App.4th at p. 1831, 26 Cal.Rptr.2d 829, fn. omitted.)

Similarly, the attorney in fact is subject to the Family Law Act, the Probate Code, the Code of Civil Procedure and local court rules. Thus, the attorney in fact may bring an action on behalf of his or her principal *only* as a guardian ad litem, the appointment of which is accomplished by order of the court. We reject Doyle's argument that the Durable Power of Attorney Act in any way altered this conclusion. However, that Act did create an important rebuttable presumption which impacts the appointment of a guardian ad litem.

Although at the hearing on Harold's dismissal motion Doyle's counsel requested that Doyle or Frederick Seymour, the independent attorney appointed for Kathleen by the Probate Court, be appointed guardian ad litem; the court refused, stating it did not have jurisdiction.

Doyle failed to petition the Family Law court for appointment of himself as guardian ad litem before he filed the dissolution action. Nevertheless, the Family Law court had jurisdiction over Kathleen's petition and possessed the authority to appoint the required guardian ad litem at any time in order to protect her interests. (Code Civ.Proc., § 372.) The Durable Power of Attorney Act provides a formal means to nominate a conservator and as such creates a *rebuttable presumption* in favor of the designated attorney in fact and conservator nominee for appointment as guardian ad litem. Doyle was Kathleen's designated attorney in fact and as her nominee for conservator at the time he initiated the Family Law action; and his post filing request to be appointed guardian ad litem was entitled to the benefit of such presumption and should not have been summarily rejected.

3. A Determination of Kathleen's Property and Support Rights Is More Properly Resolved Under the Family Law Act

[10] The Family Law Act⁹ provides remedies not available to Kathleen in the Probate Court. Under sections 4357 and 4801 of the Civil Code, Kathleen may obtain immediate temporary as well as permanent spousal support from her husband consistent with the parties' standard of living during their **marriage**. Section 4801 mandates the court to “make specific factual findings with respect to the standard of living during the **marriage**, and ... make appropriate factual determinations with respect to any other *1153 circumstances” pertaining to support by one spouse for the other. Support orders may commence on the date of filing and the support obligation automatically terminates upon the death of either spouse, absent a writing to the contrary. (Civ.Code, § 4801, subds. (a) and (b).) Support payments must first be paid from earnings, income or accumulations acquired since separation, then from community or quasi-community property, and then finally, from the separate property of the supporting spouse. Only after the exhaustion of all of those sources can the supporting spouse resort to the separate property of the other. (Civ.Code, § 4805.) The date of initiation of the action is important to the commencement of support.

Under the Family Law Act, Kathleen would have the right to recover fees and costs incurred in seeking her Family Law rights. (Civ.Code. §§ 4370, 4370.6.) In Probate Court, by contrast, Kathleen will be responsible for all the fees and costs of the **54 conservator and attorneys representing her. (Prob.Code, §§ 2640, 2641 and 2642.)

Under Probate Code section 3051, where one spouse is incapacitated and has a conservator, the other spouse who has legal capacity has "the exclusive management and control of the community property including ... the exclusive power to dispose of the community property." However, under section 4359 of the Civil Code, the Family Law court may issue immediate restraining orders ex parte to preclude any conduct contrary to the rights in separate or community property. (See, Cal.Rules of Court, rule 1283, providing for automatic restraining order upon service of summons.)

In addition, the Family Law court has authority to provide appropriate compensation to Kathleen for Harold's exclusive possession and use of the family residence while she has been receiving care elsewhere. (*In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 374, 217 Cal.Rptr. 301.)

The Family Law court provides the only satisfactory forum to obtain an accounting of the property and obligations of Kathleen and Harold incident to their **marriage**. (Civ.Code, §§ 5125, 5125.1.) This includes the requirement of full financial disclosure and cooperation with complete discovery within a short period of time. (Civ.Code, §§ 4800.10, 4800.11.) Of substantial importance in the context of the instant case is the Family Law court's power and experience in the determination of community property rights after fully-developed *adversarial proceedings*, rather than by a settlement agreement between a conservator, a stranger to Kathleen, and Harold and his children.

CONCLUSION

Kathleen's petition commenced an action against Harold upon its initial filing on March 11, 1993. Doyle, as Kathleen's attorney-in-fact, and nominee *1154 for appointment as her conservator, is presumed to be qualified to act as Kathleen's

guardian ad litem in Family Law court and, absent evidence to rebut that presumption, should have been so appointed. The Family Law court acquired jurisdiction on March 11, 1993, prior to the initiation of the probate proceedings and, upon remand from this court, retains jurisdiction to proceed with all aspects of the Family Law action and, to the extent permitted by the Family Law Act, all orders affecting Kathleen's rights and interests should be effective from and after that date except for restraining orders heretofore issued which should be reinstated as of the date of their original issuance. The Probate Court should not, in any of its proceedings, including specifically the pending hearing on Labow's petition for approval of a purported settlement, take any action inconsistent with the parties' rights and interests under the Family Law action, which provides the more appropriate forum to adjudicate the support and community property issues at stake. Indeed, in our view, it would be in the interests of justice and the best interests of the parties if that hearing were stayed pending final resolution of the Family Law proceedings. The appointed conservator's function should be limited to caring for, preserving and administering the assets of Kathleen's estate as those assets may be determined to exist by the pending proceedings under the Family Law Act.

DISPOSITION

The order of the trial court quashing service of summons on Harold and dismissing this action is reversed and the matter is remanded for further proceedings in accordance with the views expressed herein. Costs are awarded to Kathleen.

KLEIN, P.J., and KITCHING, J., concur.

Parallel Citations

27 Cal.App.4th 1139

Footnotes

- 1 We take judicial notice of these proceedings (Los Angeles Superior Court No. BP021999), as requested by the parties.
- 2 We, of course, are not bound by such summary denial. The court gave no reasons for its ruling and may well have believed that the issues presented should be resolved on appeal rather than by writ.
- 3 The basis for this conclusion is not at all clear, given that Kathleen, whose rights the conservator is supposed to be protecting, apparently received no benefit whatever from the settlement agreement.
- 4 It is not all clear to us to what extent this hearing is intended to reach and resolve the existing disputes as to Kathleen's marital rights. As we discuss below, we certainly do not believe that the Probate Court is the proper forum for the litigation of such critical issues.

- 5 Doyle contends there is a denial of equal protection to incompetent spouses who are required to bring a Family Law action by means of a guardian ad litem or conservator while a competent spouse may initiate such an action against an incompetent spouse without a guardian. We reject this argument. Even as a defendant or respondent, the incompetent spouse must be represented by a guardian ad litem or conservator. (Code Civ.Proc., § 372.) The person's incompetency justifies the requirement which was enacted to protect incompetent persons, not to preclude them legal rights. (*Briggs v. Briggs* (1958) 160 Cal.App.2d 312, 319, 325 P.2d 219.) Harold would not have been able to pursue an action against Kathleen until a guardian or conservator was appointed to protect her interests.
- 6 The court found the wife was "not insane" and had signed and verified the petition for dissolution and two declarations in support of an order to show cause. Also, her deposition showed she desired a dissolution. (*Id.*, 10 Cal.3d at pp. 479, 483-484, 110 Cal.Rptr. 897, 516 P.2d 289.)
- 7 The wife in that case had conceded that a guardian ad litem could not maintain an action for divorce on behalf of his ward. Earlier, *Cohen v. Cohen* 73 Cal.App.2d 330, 166 P.2d 622, so held for the reason that a suit for divorce was "so strictly personal" that it could not be maintained at the pleasure of a guardian or committee of an insane person. (*Id.*, at p. 335, 166 P.2d 622.)
- 8 It has been suggested either a dissolution or legal separation can be obtained by an incompetent spouse under the new statutes: "The Family Law Act, by eliminating the fault grounds and the adversary nature of the proceedings ... permits a reexamination of both rules; i.e., the objects and effects of dissolution and legal separation are now so similar that it is difficult to see why an incompetent spouse could not seek either method of termination of marriage." (4 Witkin, Cal. Procedure (3d ed.1985) Pleading § 59, p. 99.)
- The issue is not before us as the petition was amended to obtain a legal separation and a distribution of property.
- 9 Former Civil Code section 4000 et seq., repealed by Stats.1992, ch. 162, § 3, operative January 1, 1994. See now Family Code. All references herein are to the former code provisions, effective at the time of the commencement of this action.

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

In Re The Marriage Of:
GEORGE LANE
Respondent
and
SHARON LANE,
Appellant

NO. 71917-3-I

DECLARATION OF
ATTORNEY RE: CASE
LAW APPENDIX

I certify that I am Craig Jonathan Hansen. I am over the age of 18, and am competent to testify. I certify under penalty of perjury of the laws of the State of Washington that the foreign case law attached to the Appendix are true and correct copies of the cases, from Westlaw.

DATED this 30th day of December 2014.



CRAIG JONATHAN HANSEN
WSB 24060
Attorney for Appellee/Respondent

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re The Marriage Of:
GEORGE LANE
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NO. 71917-3-I
DECLARATION OF
DELIVERY

I certify that I am Craig Jonathan Hansen. I am over the age of 18, am competent to testify, and have personal knowledge of the facts of this case. On December 31, 2014, I caused to be delivered via ABC Legal Messengers, to:

Washington Court of Appeals, Div I	
Tyler K. Firkins Van Sclen Stocks Firkins 721 45 th ST NE Auburn WA 98002	Jennifer J. Gilliam 5605A Keystone Pl N Seattle, WA 98103-5925

which were the last known addresses, containing Respondent's Reply Brief and Declaration of Delivery, to be delivered not later than January 5, 2014.

Dated this 31st day of December 2014.



CRAIG JONATHAN HANSEN

2014 DEC 31 11:28:03

