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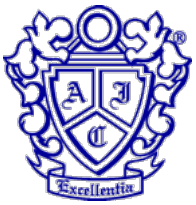

Representing Incapacitated Clients

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Representing Incapacitated Clients in Civil Cases

I. Types of case

A. Guardianships/conservatorships

- Governed by § 64.2-2000 *et seq.*

- May be appointed as guardian *ad litem* (requires qualifying course) or as counsel for respondent

"The respondent has the right to be represented by counsel of the respondent's choice. If the respondent is not represented by counsel, the court may appoint legal counsel upon the filing of the petition or at any time prior to the entry of the order upon request of the respondent or the guardian ad litem, if the court determines that counsel is needed to protect the respondent's interest. Counsel appointed by the court shall be paid a fee that is fixed by the court to be taxed as part of the costs of the proceeding."

Va. Code Ann. § 64.2-2006 (West)

B. Civil cases

- Appointment by the court

  a. Virginia appointments governed by § 8.01-9

  b. Federal appointments governed by FCRP 17(c)

- Hired by incapacitated person or by fiduciary of incapacitated person (POA or conservator)

II. Types of disability

A. Minors

- Often comes up in cases related to property interests or where minor is beneficiary or potential beneficiary

- Guardian ad litem appointments for J&DR cases fall under § 16.1-266 and are not included under this statute

- No right to a GAL when the minor is a plaintiff – *Cook v. Radford Cmty. Hosp., Inc.*, 260 Va. 443 (2000)

  - However, "a personal judgment rendered against an infant for whom it does not affirmatively appear of record that a guardian ad litem has been appointed is void." *Moses v. Akers*, 203 Va. 130, 132 (1961)

B. Prisoners sued as party defendants

- Does not govern federal lawsuits brought under federal diversity jurisdiction. In *Buchanan Cnty., VA v. Blankenship*, 406 F. Supp. 2d 642 (W.D. Va. 2005), the court found that, while it had discretion to appoint a GAL for the defendant prisoners, since each of them was represented by an attorney, no GAL was necessary.

- Necessity of GAL for inmate in jail? – some courts will grant, some won't

- A convict, who is under a disability as a matter of law, may waive their right to a GAL – *Eagleston v. Commonwealth,* 18 Va. App. 469, 473 (1994)

C. Actual or apparent disability – includes incapacitated persons, alcoholics, drug addicts

"An alcoholic is not per se civilly dead. He may freely execute contracts and deeds. Unless he actually lacks the capacity to do so, an alcoholic may waive the appointment of a guardian ad litem. Therefore, absent a showing of actual incapacity, a judgment against an alcoholic is voidable only, not subject to collateral attack."

Eagleston v. Commonwealth, 18 Va. App. 469, 473 (1994)

III. Representation

A. Professional rules

- Rule 1:14: Client with Impairment

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

- Rule 1:6: Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

B. Statutory requirements

"Every guardian ad litem shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of the defendant is so represented and protected. Whenever the court is of the opinion that the interest of the defendant so requires, it shall remove any guardian ad litem and appoint another in his stead."

Va. Code § 8.01-9(A)

- *Ruffin v. Commonwealth,* 10 Va. App. 488 (1990) – Defendant was denied due process rights where his appointed guardian ad litem failed to contact him or discuss his case, even though the defendant had stated he did not want to work with the appointed GAL

"It is the duty of the guardian ad litem to represent the interests of those for whom he is appointed faithfully and exclusively. He is not authorized to consent to anything except mere matters of formal procedure, such as maturing or expediting the cause. Such incapable defendants always and throughout the litigation are in the position of objecting to every step that is taken and everything that is done." 495 B. Lamb, A Virginia Cause 24 (1976).

- Role is not merely advisory. "[W]e have recognized that a guardian ad litem can appeal an adverse ruling, *see Givens v. Clem,* 107 Va. 435, 437, 59 S.E. 413, 414 (1907), and can consent to a transfer to another jurisdiction of a case involving an infant's rights. *Lemmon v. Herbert,* 92 Va. 653, 659, 24 S.E. 249, 251 (1896). Accordingly, we conclude that a guardian ad litem may file affirmative pleadings necessary to protect the ward's interest." *Stanley v. Fairfax Cnty. Dep't of Soc. Servs.*, 242 Va. 60, 62, 405 S.E.2d 621, 622 (1991)

- What about when the attorney has been hired by one party and then becomes appointed as the GAL?

"The role of the GAL "when representing an infant [is] to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner." *Norfolk Div. of Soc. Servs. v. Unknown Father,* 2 Va.App. 420, 425 n. 5, 345 S.E.2d 533, 536 n. 5 (1986). It is axiomatic that the GAL's investigation of the facts must be independent of any other party's interests in the outcome of the litigation. *See, e.g., Bottoms v. Bottoms,* 249 Va. 410, 420, 457 S.E.2d 102, 108 (1995) (GAL must serve as an "independent participant" in the trial court on behalf of the child); *Standards to Govern the Performance of Guardians ad litem for Children, supra* note 16 (noting a GAL must, *inter alia,* conduct an independent investigation to ascertain the facts of the case and provide the trial court sufficient information based on the findings of the GAL's independent investigation)."

Breit v. Mason, 59 Va. App. 322, 340 (2011), *aff'd sub nom. L.F. v. Breit*, 285 Va. 163 (2013)

- Is the GAL in a civil case required to file a report? No authority for it but some GALs will anyway

IV. Compensation

"When, in any case, the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow the guardian reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of the defendant. However, if the defendant's estate is inadequate for the purpose of paying compensation and expenses, all, or any part thereof, may be taxed as costs in the proceeding. In a civil action against an incarcerated felon for damages arising out of a criminal act, the compensation and expenses of the guardian ad litem shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges. If judgment is against the incarcerated felon, the amount allowed by the court to the guardian ad litem shall be taxed against the incarcerated felon as part of the costs of the proceeding, and if collected, the same shall be paid to the Commonwealth. By order of the court, in a civil action for divorce from an incarcerated felon, the compensation and expenses of the guardian ad litem shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges if the crime (i) for which the felon is incarcerated occurred after the date of the marriage for which the divorce is sought, (ii) for which the felon is incarcerated was committed against the felon's spouse, child, or stepchild and involved physical injury, sexual assault, or sexual abuse, and (iii) resulted in incarceration subsequent to conviction and the felon was sentenced to confinement for more than one year. The amount allowed by the court to the guardian ad litem shall be taxed against the incarcerated felon as part of the costs of the proceeding, and if collected, the same shall be paid to the Commonwealth."

Va. Code § 8.01-9(a)

A. Taxed as costs

- Plaintiff can be required to pay costs of GAL where they cannot maintain the suit or protect the validity of the judgment without the assistance of a GAL. *Kollsman, a Div. of Sequa Corp. v. Cubic Corp.*, 800 F. Supp. 1381, 1383 (E.D. Va. 1992), *rev'd sub nom. Kollsman, a Div. of Sequa Corp. v. Cohen*, 996 F.2d 702 (4th Cir. 1993)

- "In the presence of peculiar facts, such as the creation of a fund which enures to the common benefit of all concerned, courts may properly assess the [GAL] fee against the common fund" instead of the assets of the represented party. *Austin v. Dobbins*, 219 Va. 930, 939 (1979)

B. Paid from estate of defendant

- Client is mentally competent and has assets but is under a legal disability.

- What do you charge? How do you get paid?

    - Appoint a committee for someone in prison

"No action or suit on any claim or demand, except suits for divorce, actions to establish a parent and child relationship between a child and a prisoner and actions to establish a prisoner's child support obligation, shall be maintained against a prisoner after judgment of conviction and while he is incarcerated, except through his committee, unless a guardian ad litem is appointed for the prisoner pursuant to § 8.01-9, or an attorney licensed to practice law in the Commonwealth has entered of record an appearance for such prisoner. However, in any suit for divorce instituted against a prisoner, the court shall appoint a committee prior to any determination as to the property of the parties under § 20-107.3."

Va. Code § 53.1-223

- How do you have that discussion?

- What if client objects to fees?

Bradshaw v. Est. of Watson, No. 1782-22-2, 2024 WL 780603 (Va. Ct. App. Feb. 27, 2024) – Petitioner filed to terminate trust for which defendant, an incarcerated felon, was beneficiary. The defendant – but not the GAL – appeared at the hearing and agreed to the relief. The GAL did not present the final order to the defendant before agreeing to it, and

it included a provision that both her costs and fees and those of the trustee should be paid out of the trust funds. The defendant sent a letter to the court asking that the final order be amended, but the court decided that this was an *ex parte* communication and refused to read it, and the GAL did not bring his concerns to the court despite being informed of them. The Court of Appeals found that because the trial judge had inherently found the GAL fees to be reasonable, it would not overturn the award.

MEMORANDUM

Representing incapacitated clients in criminal cases

I. Incapacity versus incompetence

In criminal cases we often hear about competency to stand trial. Competency in a criminal case is measured by a very low bar: a defendant is considered incompetent if he does not have the present ability to consult with his lawyer "with a reasonable degree of rational understanding [and] a rational as well as factual understanding of the proceedings against him."

If a criminal defendant meets this standard then unless they are unrestorable, the court will order that they be restored. Restoration can take a variety of forms. Medication for those who have a mental health condition that responds to medication or, education and memorization for those who either have intellectual disabilities or other educational deficits.

This standard is lower than the civil standard of incapacity where a court finds by clear and convincing evidence that an adult is "incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition. A finding that a person is incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 unless the court order entered pursuant to this chapter specifically provides otherwise."

So it happens that you can be representing a client who meets the above standard but can still be prosecuted for a criminal case.

II. Background on Incompetence to Stand Trial

The Supreme Court of the United States has held that trying an incompetent criminal defendant violates the right to due process. *Burns v. Commonwealth*, 279 Va. 243, 254–55 (2010); *Cooper v. Oklahoma,* 517 U.S. 348, 354 (1996); *Medina v. California,* 505 U.S. 437, 453 (1992). A defendant is considered incompetent if he does not have the present ability to consult with his lawyer "with a reasonable degree of rational understanding [and] a rational as well as factual understanding of the proceedings against him." *Cooper,* 517 U.S. at 354 (quoting *Dusky*

v. United States, 362 U.S. 402 (1960)). Additionally, a defendant's competency is fluid and can change even after a trial starts. *Stewart v. Commonwealth*, 79 Va. App. 79, 85–86 (2023); *see Drope v. Missouri*, 420 U.S. 162, 181 (1975); *see* Code § 19.2-169.1(A). With a variety of factors and no set standard, competency is something every judge and defense attorney must be on the lookout for.

Who decides? What is the standard of review?

Competency is a question of fact to be made by the trial court. Code § 19.2-169.1(e). As such, a trial court's determination of a defendant's competency to stand will not be reversed on appeal unless it is plainly wrong or without evidence to support it. *Grattan v. Commonwealth*, 278 Va. 602, 616–17 (2009); *Stewart*, 79 Va. App. at 87. Moreover, a trial court is not bound by a prior court's determination that defendant is incompetent to stand trial. *Stewart*, 79 Va. App. at 88. In *Stewart*, even though defendant was found to be unrestorably incompetent to stand trial for prior charges less than two years before, the trial court's determination that he was competent to stand trial for his current charges was upheld. *Id.*

Indicators of Incompetence

There are no "fixed or immutable signs" that indicate a defendant is incompetent to stand trial. *Drope,* 420 U.S. at 180. Therefore, the evaluation is fact intensive and case specific. *Id., Johnson v. Commonwealth*, 53 Va. App. 79, 92 (2008). Some factors a court may rely on include, but are not limited to, defendant's irrational behavior, his demeanor at trial, his prior medical history, the opinion of mental health experts, the court's own perception of defendant's behavior, and defense counsel's perception of defendant's competence. *See Drope,* 420 U.S. at 180; *see Johnson* 53 Va. App. at 92; *see Smith,* 48 Va.App. at 521; *see Grattan*, 278 Va. at 618. Any factor

may, potentially, be sufficient to make a finding on defendant's competence. *Johnson* 53 Va. App. at 92 (citing *Drope,* 420 U.S. at 180).

Defense counsel's satisfaction with defendant's competence is significant because they are in the best position to evaluate the defendant's ability to understand the proceedings. *Smith,* 48 Va.App. at 528 (quoting *United States v. Caicedo,* 937 F.2d 1227, 1233 (7th Cir.1991)). In *Smith*, for example, defendant tried to hang himself before the jury returned its verdict. *Id.* However, after conferring with defendant, counsel made no further argument over defendant's competence. *Id.* The Court of Appeals ruled that the trial court was not, under such circumstances, require to halt the trial and require a mental evaluation. *Id.* at 533.

Moreover, courts have not required defense counsel to submit certain pieces of evidence to obtain a competency exam. *Johnson*, 53 Va. App. at 95; *see Clark v. Commonwealth*, 73 Va. App. 695, 710–11 (2021). In *Clark*, the trial court judge repeatedly asked defense counsel for "evidence" when she proffered her experiences with defendant and her opinion of defendant's competency. *Clark*, 73 Va. App. at 711. The Virginia Court of Appeals held that, by dismissing defense counsel's representations in this way, the trial court contravened Code § 19.2-169.1(A), which specifically references counsel's representations as a basis for probable cause. *Id.* However, while the court should strongly consider representations by defense counsel, such statements, standing alone, do not necessarily provide probable cause for an evaluation." *See Johnson*, 53 Va. App. at 94.

Beyond the opinion of defense counsel, the trial court itself has a duty to evaluate the competence of the defendant and order an exam *sua sponte*. *Johnson*, 53 Va. App. at 95 (relying on *Burt v. Uchtman,* 422 F.3d 557, 564 (7th Cir.2005)); *Smith,* 48 Va.App. at 533–34. The trial court necessarily relies on its own observations made during trial, prior court appearances, and at

any competency hearing that they may order. *Grattan v. Commonwealth*, 278 Va. 602, 618 (2009). In *Grattan*, the court relied on the six-to-seven hour period it had observed defendant in open court, and on a portion of the video recording of defendant's interview with a mental health expert. *Id.* Since the determination of competency remains with the trial court, conflicting findings from experts on either side as to the defendant's competency are ultimately resolved by the trial court's judgment. *Johnson*, 53 Va. App. at 96.

Finally, while disruptive and erratic behavior in court and past mental health issues are indicators of potential incompetency, it does not necessarily entitle defendant to a competency hearing. *See Johnson*, 53 Va. App. at 96; *see Dang v. Commonwealth*, 287 Va. 132, 148 (2014); *see Bramblett v. Commonwealth,* 257 Va. 263, 273 (1999). The standard is still whether he can understand the proceedings and participate in his defense. Indicators of incompetency remain only indicators, and the trial court must exert its discretion. "Neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Dang*, 287 Va. at 148 (quoting *Walton v. Angelone,* 321 F.3d 442, 460 (4th Cir.2003)).

III. Practical considerations for lawyers representing individuals who have issues of capacity

a. At the initial meeting, ask if possible, about mental health history, Individual Education Plans (IEPs), 504s, job history, substance use history, educational achievement (how far in school), prior court evaluations
b. Have them explain the charge they have and their understanding.
c. If using an interpreter, check in with the interpreter as to whether or not the client understands the questions you are asking or the concepts you are raising, use simple vocabulary
d. If you are being retained, if you suspect a capacity issue there may be a concern regarding signing an engagement agreement unless there is a power of attorney
e. If there is a concern regarding intellectual or developmental disability clients can often parrot back information. Make sure you are not asking yes or no questions.

f. Collect information from family members if possible
g. Competency is fluid – especially for individuals with mental health disorders and certain types of dementia.
h. People with dementia, developmental disabilities and intellectual disabilities are prosecuted every day and it is our job to educate juries and judges when capacity is fluid or borderline
i. Va. Code 271.6 – possible game changer – allows evidence of diminished capacity or diagnoses in evidence for jury or judge's consideration in guilt or innocence phase
j. Disposition of incompetent defendant's when they are unrestorable – community or facility? Basis of incompetence critical.

IV. Statutory references

Va. Code 19.2-169.1, 169.2, 169.3, 169.4, 169.5, and 19.2-271.6

Stewart case.

VA Code Ann. § 8.01-9

§ 8.01-9. Guardian ad litem for persons under disability; when guardian ad litem need not be appointed for person under disability

Currentness

A. A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian ad litem to such defendant, whether the defendant has been served with process or not. If no such attorney is found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem. Any guardian ad litem so appointed shall not be liable for costs. Every guardian ad litem shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of the defendant is so represented and protected. Whenever the court is of the opinion that the interest of the defendant so requires, it shall remove any guardian ad litem and appoint another in his stead. When, in any case, the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow the guardian reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of the defendant. However, if the defendant's estate is inadequate for the purpose of paying compensation and expenses, all, or any part thereof, may be taxed as costs in the proceeding. In a civil action against an incarcerated felon for damages arising out of a criminal act, the compensation and expenses of the guardian ad litem shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges. If judgment is against the incarcerated felon, the amount allowed by the court to the guardian ad litem shall be taxed against the incarcerated felon as part of the costs of the proceeding, and if collected, the same shall be paid to the Commonwealth. By order of the court, in a civil action for divorce from an incarcerated felon, the compensation and expenses of the guardian ad litem shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges if the crime (i) for which the felon is incarcerated occurred after the date of the marriage for which the divorce is sought, (ii) for which the felon is incarcerated was committed against the felon's spouse, child, or stepchild and involved physical injury, sexual assault, or sexual abuse, and (iii) resulted in incarceration subsequent to conviction and the felon was sentenced to confinement for more than one year. The amount allowed by the court to the guardian ad litem shall be taxed against the incarcerated felon as part of the costs of the proceeding, and if collected, the same shall be paid to the Commonwealth.

B. Notwithstanding the provisions of subsection A or the provisions of any other law to the contrary, in any suit wherein a person under a disability is a party and is represented by an attorney-at-law duly licensed to practice in this Commonwealth, who shall have entered of record an appearance for such person, no guardian ad litem need be appointed for such person unless the court determines that the interests of justice require such appointment; or unless a statute applicable to such suit expressly requires that the person under a disability be represented by a guardian ad litem. The court may, in its discretion, appoint the attorney of record for the person under a disability as his guardian ad litem, in which event the attorney shall perform all the duties and functions of guardian ad litem.

Any judgment or decree rendered by any court against a person under a disability without a guardian ad litem, but in

compliance with the provisions of this subsection, shall be as valid as if the guardian ad litem had been appointed.

Credits

Acts 1977, c. 617; Acts 1996, c. 887; Acts 1999, c. 945; Acts 1999, c. 955; Acts 1999, c. 987; Acts 2001, c. 127; Acts 2003, c. 563. Amended by Acts 2021, Sp. S. I, c. 463, eff. July 1, 2021.

Notes of Decisions (58)

VA Code Ann. § 8.01-9, VA ST § 8.01-9
The statutes and Constitution are current through the 2024 Regular Session and 2024 Special Session I.

Federal Rules of Civil Procedure Rule 17

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

Currentness

(a) Real Party in Interest.

(1) ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) ***Action in the Name of the United States for Another's Use or Benefit.*** When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) ***Without a Representative.*** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 25, 1988, effective August 1, 1988; amended by Pub.L. 100-690, Title VII, § 7049, November 18, 1988, 102 Stat. 4401 (although amendment by Pub.L. 100-690 could not be executed due to prior amendment by Court order which made the same change effective August 1, 1988); April 30, 2007, effective December 1, 2007.)

<Amendments received through April 1, 2024>

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The real party in interest provision, except for the last clause which is new, is taken verbatim from [former] Equity Rule 37 (Parties Generally--Intervention), except that the word "expressly" has been omitted. For similar provisions see N.Y.C.P.A., (1937) § 210; Wyo.Rev.Stat.Ann. (1931) §§ 89-501, 89-502, 89-503; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 8. See, also Equity Rule 41 (Suit to Execute Trusts of Will--Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U.S.C., Title 40, § 270b [see now 40 U.S.C.A. § 3133(b)] (Suit by persons furnishing labor and material for work on public building contracts * * * may sue on a payment bond, "in the name of the United States for the use of the person suing"); and U.S.C., Title 25, § 201 (Penalties under laws relating to Indians--how recovered). Compare U.S.C., Title 26, Int.Rev.Code [1939], § 3745(c) [former § 1645(c)] (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).

Note to Subdivision (b). For capacity see generally Clark and Moore, *New Federal Civil Procedure*--II. Pleadings and Parties, 44 Yale L.J. 1291, 1312-1317 (1935) and specifically *Coppedge v. Clinton,* 72 F.2d 531 (C.C.A.10th, 1934) (natural person); *David Lupton's Sons Co. v. Automobile Club of America,* 225 U.S. 489, 32 S.Ct. 711, 56 L.Ed. 1177, Ann.Cas.1914A, 699 (1912) (corporation); *Puerto Rico v. Russell & Co.,* 288 U.S. 476, 53 S.Ct. 447, 77 L.Ed. 903 (1933) (unincorporated assn.); *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922) (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule follows the existing law as to such associations, as declared in the case last cited above. Compare *Moffat Tunnel League v. United States,* 289 U.S. 113, 53 S.Ct. 543, 77 L.Ed. 1069 (1933). See note to Rule 23, clause (1).

Note to Subdivision (c). The provision for infants and incompetent persons is substantially former Equity Rule 70 (Suits by or Against Incompetents) with slight additions. Compare the more detailed English provisions, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r.r. 16-21.

1946 Amendment

Note. The new matter [in subdivision (b)] makes clear the controlling character of Rule 66 regarding suits by or against a federal receiver in a federal court.

1948 Amendment

Since the statute states the capacity of a federal receiver to sue or be sued, a repetitive statement in the rule is confusing and undesirable.

1966 Amendment

The minor change in the text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule. These illustrations, of course, carry no negative implication to the effect that there are not other instances of recognition as the real party in interest of one whose standing as such may be in doubt. The enumeration is simply of cases in which there might be substantial doubt as to the issue but for the specific enumeration. There are other potentially arguable cases that are not excluded by the enumeration. For example, the enumeration states that the promisee in a contract for the benefit of a third party may sue as real party in interest; it does not say, because it is obvious, that the third-party beneficiary may sue (when the applicable law gives him that right.)

The rule adds to the illustrative list of real parties in interest a bailee--meaning, of course, a bailee suing on behalf of the bailor with respect to the property bailed. (When the possessor of property other than the owner sues for an invasion of the possessory interest he is the real party in interest.) The word “bailee” is added primarily to preserve the admiralty practice whereby the owner of a vessel as bailee of the cargo, or the master of the vessel as bailee of both vessel and cargo, sues for damage to either property interest or both. But there is no reason to limit such a provision to maritime situations. The owner of a warehouse in which household furniture is stored is equally entitled to sue on behalf of the numerous owners of the furniture stored. Cf. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947).

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed--in both maritime and nonmaritime cases. See *Levinson v. Deupree,* 345 U.S. 648 (1953); *Link Aviation, Inc. v. Downs,* 325 F.2d 613 (D.C.Cir. 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious

person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice--in short, to codify in broad terms the salutary principle of *Levinson v. Deupree,* 345 U.S. 648 (1953), and *Link Aviation, Inc. v. Downs,* 325 F.2d 613 (D.C.Cir. 1963).

1987 Amendment

The amendments are technical. No substantive change is intended.

1988 Amendment

The amendment is technical. No substantive change is intended.

2007 Amendment

The language of Rule 17 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 17(d) incorporates the provisions of former Rule 25(d)(2), which fit better with Rule 17.

Notes of Decisions (1130)

O'CONNOR'S CROSS REFERENCES
O'Connor's Federal Rules Civil Trials:

See ***O'Connor's Federal Rules***, "Parties," ch. 2-B, §2; ***O'Connor's Federal Civil Forms***, FORMS 2B:1 et seq.

O'CONNOR'S ANNOTATIONS
U.S. v. City of N.Y., 556 U.S. 928, 934-35 (2009). "The phrase, 'real party in interest,' is a term of art utilized in federal law to refer to an actor with a substantive right whose interests may be represented in litigation by another."

Mondelli v. Berkeley Heights Nursing & Rehab. Ctr., 1 F.4th 145, 149-51 (3d Cir.2021). "A court's obligation under Rule 17 to appoint a guardian for an incompetent person is mandatory. A district court must invoke Rule 17 sua sponte and consider whether to appoint a representative for an incompetent person when there is 'verifiable evidence of incompetence.' Verifiable evidence of incompetence includes (1) 'evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent,' or (2) 'evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent.' Therefore, anecdotal information or layperson opinions do not constitute verifiable evidence. [¶] Rule 17's obligation is not limited to pro se litigants. [It is] clear that the phrase 'unrepresented in an action' under Rule 17[(c)(2)] does not refer to

whether the party has counsel. Rather, whether an incompetent person is 'unrepresented in an action' refers to whether that person has a Rule 17-type representative. [¶] [And even if] a person may have legal counsel, that person's other interests may remain unrepresented and 'otherwise unprotected.' Until a court satisfies itself that those interests are protected, it lacks the authority to reach the merits of the case. In sum, a district court presented with verifiable evidence of incompetence may abuse its discretion under Rule 17(c) if it fails to appoint a next friend or guardian ad litem to represent an incompetent person, even when he or she is represented by counsel."

Klein v. Qlik Techs., Inc., 906 F.3d 215, 226 (2d Cir.2018). "'Rule 17(a) substitution of plaintiffs should be liberally allowed when the change is merely formal and in no way alters the original complaint's factual allegations as to the events or the participants.' Even if a proposed substitution meets these requirements, it should be denied if it is being proposed 'in bad faith or in an effort to deceive or prejudice the defendants.' A court may also deny a Rule 17(a) substitution if doing so would otherwise result in 'unfairness to defendants.' In sum, '[a]lthough the district court retains some discretion to dismiss an action where there was no semblance of any reasonable basis for the naming of an incorrect party, there plainly should be no dismissal where substitution of the real party in interest is necessary to avoid injustice.'"

Applications in Internet Time, LLC v. RPX Corp., 897 F.3d 1336, 1348 (Fed.Cir.2018). "'The list in Rule 17(a) is not meant to be exhaustive and *anyone possessing the right to enforce a particular claim is a real party in interest* even if that party is not expressly identified in the rule.' [¶] [T]he effect of Rule 17(a) 'is that the action must be brought by the person who, according to the governing substantive law, is *entitled to enforce the right*.' Indeed, '[t]he basis for the real-party-in-interest rule was stated by the Advisory Committee' … as follows: '[T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata.' … '[I]n order to apply Rule 17(a)(1) properly, it is necessary to identify the law that created the substantive right being asserted by plaintiff.'"

Horowitz v. 148 S. Emerson Assocs., 888 F.3d 13, 19 n.4 (2d Cir.2018). "'[C]apacity has been defined [under Rule 17(b)] as a party's personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest or is the real party in interest. Generally, capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate and typically is determined without regard to the particular claim or defense being asserted.'"

Harris v. Mangum, 863 F.3d 1133, 1138-39 (9th Cir.2017). Under FRCP 17(c), "a district court has broad discretion to fashion an appropriate safeguard that will protect an incompetent person's interests. [¶] In the rare case when it is clear that a litigant has no protectable interest, … proceeding with a competency hearing would be a complete waste of time and effort. Considering the appointment of a guardian ad litem in such a circumstance would not advance '[t]he purpose of Rule 17(c) [in] protect[ing] an incompetent person's interests.' *At 1139 n.2:* In fact, appointing a guardian ad litem in such a case could hinder the purpose of Rule 17(c) if the guardian thereby became unavailable to represent a different litigant who did have protectable interests."

Rideau v. Keller ISD, 819 F.3d 155, 165-66 (5th Cir.2016). FRCP 17 "recognizes that … questions about who may prosecute a case may not be simple and provides for the possibility of relief when a reasonable mistake is made. Under Rule 17(a)(3), a court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. That unequivocal command indicates that ratification is mandatory when timely sought. But our court and others have interpreted the Rule in light of the Advisory Committee Notes, which state that this provision was added simply in the interests of justice and is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. Ratification thus is applicable only when the plaintiff brought the action in her own name as the result of an understandable mistake, because the determination of the correct party to bring the action is difficult. [¶] This judicial 'gloss' on the Rule 17(a)(3) standard is not meant to detract from its permissive text. Instead, it is aimed at cabining Rule 17(a)(3) to its intended purpose: the avoidance of forfeiture and injustice when an understandable mistake has been [made] in selecting the party in whose name the action should be brought. [¶] Rule 17(a)(3) ratification does not depend on the absence of any mistake; rather, ratification is proper when the mistake is understandable." (Internal quotes omitted.) *See also* ***Jones v. Las Vegas Metro. Police Dept.***, 873 F.3d 1123, 1128-29 (9th Cir.2017).*But see* ***Klein v. Qlik Techs.***, 906 F.3d 215, 226 (2d Cir.2018) (P's honest mistake is not precondition for granting FRCP 17(a)(3) motion; instead, substitution is allowed if it does not change substance of action and does not reflect bad faith from Ps or unfairness to Ds).

La Russo v. St. George's Univ. Sch. of Med., 747 F.3d 90, 96 (2d Cir.2014). FRCP 17(a) "appears to apply to the party initiating an action, not a defendant resisting a claim. … 'By its very nature, Rule 17(a) applies only to those who are asserting a claim and thus is of most importance with regard to plaintiffs[.]' [A leading treatise] flatly declares, 'Rule 17(a) is limited to plaintiffs'…."

Federal Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd., 726 F.3d 63, 83 (2d Cir.2013). "To ratify a suit, the real party in interest must '(1) authorize continuation of the action and (2) agree to be bound by its result.'"

Kuelbs v. Hill, 615 F.3d 1037, 1042 (8th Cir.2010). See annotation under FRCP 25.

Sam M. v. Carcieri, 608 F.3d 77, 85 (1st Cir.2010). "Rule 17(c) … governs a minor or incompetent's access to federal court. It directs that a minor or incompetent may sue in federal court through a duly appointed representative which includes a general guardian, committee, conservator, or like fiduciary. If a minor lacks a general guardian or a duly appointed representative, Rule 17(c)(2) directs the court either appoint a legal guardian or Next Friend, or issue an order to protect a minor or incompetent who is unrepresented in the federal suit. [¶] The appointment of a Next Friend or guardian ad litem is not mandatory. Thus, where a minor or incompetent is represented by a general guardian or a duly appointed representative, a Next Friend need not be appointed. However, Rule 17(c) 'gives a federal court power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent person where that representative is unable, unwilling or refuses to act or has interests which conflict with those of the infant or incompetent.'" *See also* ***Davis v. Walker***, 745 F.3d 1303, 1310 (9th Cir.2014); ***Fonner v. Fairfax Cty.***, 415 F.3d 325, 330 (4th Cir.2005).

In re Signal Int'l, 579 F.3d 478, 487-88 (5th Cir.2009). FRCP 17(a)(3) "requires the defendant to object in time to allow the opportunity for joinder of the ostensible real party in interest, and the defense may be waived if the defendant does not timely object. The defendant timely objects so long as joinder of the real party in interest remains 'practical and convenient.' Objection is typically practical in the early stages of litigation--disputes regarding the real party in interest are likely to be evident to a defendant at the onset of suit, because he almost always knows whether he has been sued by the party who 'owns' the claim. The earlier the defense is raised, the more likely that the high cost of trial preparation for both parties can be avoided if a real party in interest question is determined adversely to a plaintiff. [¶] The relevant factors for [determining practicality and convenience] are when the defendant knew or should have known about the facts giving rise to the plaintiff's disputed status as a real party in interest; whether the objection was raised in time to allow the plaintiff a meaningful opportunity to prove its status; whether it was raised in time to allow the real party in interest a reasonable opportunity to join the action if the objection proved successful; and other case-specific considerations of judicial efficiency or fairness to the parties." (Internal quotes omitted.) *See also* ***In re Engle Cases***, 767 F.3d 1082, 1109 (11th Cir.2014); ***RK Co. v. See***, 622 F.3d 846, 850 (7th Cir.2010).

Fed. Rules Civ. Proc. Rule 17, 28 U.S.C.A., FRCP Rule 17
Including Amendments Received Through 2-1-2025

End of Document

American College of Trust and Estate Counsel (ACTEC)

The ACTEC Commentaries on the Rules of Professional Conduct

Excerpts from ACTEC COMMENTARY ON MRPC 1.14

Declining and Diminished Capacity. MRPC 1.14 does not define "diminished capacity." In some cases, it is easily identifiable, as when a minor lacks contractual capacity due sheerly to the minor's age. In other cases, the determination is more difficult, as when an individual is exhibiting signs of dementia. The latter case rarely results in immediate "diminished capacity" but rather usually occurs gradually, with increased vulnerability as the decision-making capacity of the individual declines.

For purposes of this Commentary, a person with "diminished capacity" refers to someone whose intellectual acuity is so substantially impaired, as a result of some illness, condition, or injury, that the person lacks the ability to make informed financial, medical, or personal decisions. A formal determination of diminished capacity need not have been made by a medical doctor or a court in order for a lawyer to believe that a client suffers from diminished capacity. A lawyer must be aware, however, that his or her determination of the client's diminished capacity is subjective and that the lawyer may lack the expertise to appraise the client's capacity accurately.

A person with "declining capacity," for purposes of this Commentary, refers to someone who is beginning to exhibit signs of reduced capacity but who possesses the ability to make informed decisions with respect to some or all financial, medical, or personal matters. Signs of declining capacity include, but are not limited to, occasional forgetfulness, confusion, or disorientation concerning persons or events that a fully competent person would understand clearly. A lawyer who believes that a client suffers from either diminished capacity or declining capacity should always act in a manner that is consistent with MRPC 1.14(a)'s direction to maintain a normal lawyer-client relationship to the extent reasonably possible.

Implied Authority to Disclose and Act. Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client and the lawyer reasonably believes that the client is unable because of diminished capacity, either temporary or permanent, to protect himself or herself. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. If the client has given an express direction not to consult with an individual or group, the lawyer may not override that direction unless there has been a material change that would render the express direction no longer applicable.

MRPC 1.14(c) makes it clear that the lawyer is only authorized to disclose client confidences "to the extent reasonably necessary to protect the client's interests." The disclosures can be made to protect the client "even when the client directs the lawyer to the contrary." MRPC 1.14, cmt [8].

But before making such protective disclosures, it is incumbent on the lawyer to assess whether the person or entity consulted will act adversely to the client's interests. Id. See also ABA Informal Opinion 89-1530 (1989).

In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. A lawyer is not required to seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client. However, under MRPC 1.14(b), when the lawyer reasonably believes the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take protective action, including, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

The lawyer should also consider whether applicable state law includes mandatory reporting requirements for situations involving individuals with diminished or declining capacity where exploitation or exposure to unsafe situations is occurring…

Risk and Substantiality of Harm. For the purposes of determining whether to take protective action for a client whose capacity is diminished, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client had full capacity. During periods of declining capacity, a client may become susceptible to impaired decision-making due to an increasing inability to assess and understand risk. Additionally, the substantiality of the harm to the client may be exacerbated by the fact that the client whose capacity is diminished will not be in a position to recoup any losses suffered. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client when the client had full capacity and, to the extent feasible, pursue what would have been that client's wishes and interests. Absent this knowledge, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client but that result in the least extensive intrusion into the client's autonomy.

Determining Extent of Diminished Capacity. In determining whether a client's capacity is diminished, a lawyer may consider the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the legal standards and definitions of capacity for the transactions involved, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long-term goals and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional to assess the client's capacity.

Lawyer Retained by Fiduciary for Person with Diminished Capacity. The lawyer retained by a person seeking appointment as a fiduciary or retained by a fiduciary for a person with diminished capacity, including a guardian, conservator or attorney-in-fact, stands in a lawyer-client relationship with respect to the prospective or appointed fiduciary. A lawyer who is retained by a

fiduciary for a person with diminished capacity, but who did not previously represent the person with diminished capacity, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the person with diminished capacity.

If the lawyer represents the fiduciary, as distinct from the person with diminished capacity, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer may, under applicable state law, have an obligation to disclose, to prevent or to rectify the fiduciary's misconduct.

As suggested in the Commentary to MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer who represents a fiduciary for a person with diminished capacity or who represents a person who is seeking appointment as such, should consider asking the client to agree that, as part of the engagement, the lawyer may disclose fiduciary misconduct to the court, to the person with diminished capacity, or to other interested persons.

Lawyer Representing Person with Diminished Capacity for Whom a Fiduciary Has Been Appointed by a Court. A lawyer who represented a client before the client suffered diminished capacity should ordinarily look to the court-appointed fiduciary to make decisions for the client. The lawyer is impliedly authorized to disclose to the fiduciary sufficient information to permit the fiduciary to properly protect the client's interest. The ongoing duties of a lawyer to a client with diminished capacity for whom a fiduciary has been appointed may differ from state to state.

In some situations, the scope of the fiduciary's duties and the limitations on the client's ongoing rights might be limited. For example, in some states, a court may appoint a fiduciary to exercise only limited rights of the client. In those instances, a lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been

appointed. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity may appropriately continue to meet with and counsel him or her.

Whether the person with diminished capacity is characterized as a client or a former client, the client's lawyer acting as counsel for the fiduciary owes some continuing duties to him or her.

If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer should take the steps necessary to protect the interests of the client consistent with this rule.

Lawyer Appointed or Hired to Represent a Person with Diminished Capacity in a Guardianship

Proceeding. In many states, when a proceeding is initiated to impose a guardianship or conservatorship or other protective arrangement, the person who will be the subject of that proceeding ("respondent") is entitled automatically to be represented by counsel. In other states, the respondent or a guardian ad litem may request that the respondent be represented by counsel. The respondent may retain his or her own lawyer or a lawyer may be appointed by the court. A

lawyer who is representing a respondent should ascertain exactly what role the lawyer is to play in the guardianship proceeding under applicable state law.

In those states that have an articulated rule, the majority approach is that the lawyer is to advocate for the respondent's expressed wishes rather than what the lawyer thinks may be in the client's best interests. In those states the court may also appoint a guardian ad litem whose role is to promote results that will be in the respondent's best interest rather than to advocate for the respondent's expressed preferences. In a few states, the lawyer who is appointed to represent the respondent is to act in the role of a guardian ad litem.

(See, e.g., Idaho Code Ann. §15-5-303(b)).

Reporting Elder Abuse. Elder abuse has been labeled "the crime of the 21st century," Kristen Lewis, The Crime of the 21st Century: Elder Financial Abuse, PROB. &PROP. Vol. 28 No. 4 (Jul./Aug. 2014). Individuals who are the victims of elder abuse are often reluctant to disclose the abuse and seek assistance, particularly when the abuser is a family member or someone close to the victim. Thus, a lawyer who suspects his or her client is the victim of elder abuse may be faced with the dilemma of whether to seek protection for the client by reporting the abuse and disclosing confidential information if the client refuses to or cannot consent to the disclosure.

Every state has enacted elder abuse reporting laws. However, the role and obligations of lawyers with respect to the reporting of elder abuse vary significantly among the states. Some states have expressly made lawyers mandatory reporters of suspected elder abuse. See, e.g., Tex. Hum. Res. Code § 48.051(a)–(c) (2015); Miss. Code Ann. § 43-47-7(1)(a)(i) (2019); Ohio Rev. Code Ann. § 5101.63 (2019); Ariz. Rev. Stat. § 46-454(B) (2019); Mont. Code Ann. § 52-3-811 (2003) (exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. See, e.g., Del. Code Ann. Tit. 31, § 3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), which allows disclosure "to comply with other law," should apply in the states that require lawyers to report elder abuse. Disclosure in these states must be limited to what the lawyer reasonably believes is necessary to comply with the law.

In those states where a lawyer has no mandatory reporting duty, a lawyer's ability to report elder abuse where MRPC 1.6 would otherwise restrict disclosure of confidential information may be governed by MRPC 1.14(b). In addition, the lawyer's ability may be affected by any other exception to MRPC 1.6 (such as the exception for disclosing confidential information "to prevent reasonably certain death or other substantial bodily harm"). In order to rely on MRPC 1.14(b)'s permission to "take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client," the lawyer must first determine that the client has diminished capacity.

Before the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professionals and whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client's living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client. See NH Ethics

Committee Advisory Opinion #2014-15/5 (The Lawyer's Authority to Disclose Confidential Client Information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm). In cases where the scope of representation has been limited pursuant to Rule 1.2, the limitation of scope does not limit the lawyer's obligation or discretion to address signs of abuse or exploitation (consistent with Rules 1.14 and 1.6 and the applicable state's elder abuse law) in any aspect of the client's affairs of which the lawyer becomes aware, even if beyond the agreed-upon scope of representation.

Excerpt from ACTEC COMMENTARY ON MRPC 1.6

Client Who Apparently Has Diminished Capacity. As provided in MRPC 1.14 (Client with Diminished Capacity), a lawyer for a client who has, or reasonably appears to have, diminished capacity is, in most jurisdictions, authorized to take reasonable steps to protect the interests of the client, including the disclosure, where appropriate and not prohibited by state law or ethical rule, of otherwise confidential information. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity), ABA Inf. Op. 89-1530 (1989), and *Restatement (Third) of the Law Governing Lawyers*, §§24, 51 (2000). In such cases, where permitted by the jurisdiction, the lawyer may either initiate a guardianship or other protective proceeding or consult with diagnosticians and others regarding the client's condition, or both. In disclosing confidential information under these circumstances, the lawyer may disclose only that information necessary to protect the client's interests [MRPC 1.14(c) (Client with Diminished Capacity)]. Note that California does not permit the lawyer to take action without the client's consent.

2024 WL 780603
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UNPUBLISHED
Court of Appeals of Virginia.

Keith Alan BRADSHAW
v.
ESTATE OF Thomas Owens WATSON

Record No. 1782-22-2
|
February 27, 2024

FROM THE CIRCUIT COURT OF NOTTOWAY COUNTY, Paul W. Cella, Judge

Attorneys and Law Firms

Keith Alan Bradshaw, pro se.

(Clay L. Macon; Konstantine Kastens; Glasser & Macon, P.C., on brief), for appellee. Appellee submitting on brief.

(Linda M. H. Tomlin; The Law Office of Linda M. H. Tomlin, PLLC), Guardian ad litem for appellant.
Present: Judges Athey, Fulton and Causey

MEMORANDUM OPINION*

JUDGE CLIFFORD L. ATHEY JR.

***1** Keith Alan Bradshaw ("Bradshaw") appeals from an October 24, 2022 order entered in the Nottoway County Circuit Court ("circuit court") terminating a trust for which Bradshaw was a beneficiary. The order awarded attorney fees and costs to the trustee and guardian ad litem fees to the attorney appointed to represent Bradshaw. These awards were to be paid from the proceeds resulting from terminating the trust. Bradshaw, *pro se*, contends that the circuit court erred by awarding attorney fees and costs to the trustee and guardian ad litem from the proceeds resulting from terminating the trust. We disagree, and for the following reasons affirm the circuit court's order.

I. BACKGROUND

In 2003, Thomas Owens Watson ("Watson") executed his last will and testament, which created a trust containing $50,000 for the sole benefit of Bradshaw. The will named Bradshaw's brother, Steven K. Bradshaw ("Steven/trustee"), as trustee of the resulting trust. The trust created by the will instructed Steven to utilize the trust assets to purchase certain real estate for the benefit of his brother; however, in the event that said real estate could not be purchased within 20 years, he was to distribute the trust principal and interest to his brother. Watson's will also included the following provisions, relevant to this appeal. Article I stated: "I direct that all of my lawful unsecured debts, funeral expenses, expenses of my last illness, expenses of administration and taxes owed by my estate whether as a consequence of my death or otherwise, be paid out of my residuary estate without apportionment among the beneficiaries of my estate." Article III of the will stated: "[t]o the extent permitted by law, neither the principal nor income [of the trust] shall be liable for the debts of any beneficiary," before concluding that "[i]n addition to the powers granted by law, I grant to my Trustee those powers set forth in Section 64.1-57 of the Code of Virginia, as in force from time to time, and I incorporate that Code Section in said trust by this reference." In addition, Article V devised the entirety of Watson's residuary estate to Steven, who was also nominated in Watson's will to serve as executor pursuant to Article VI. Following Watson's death, Steven assumed his duties as both executor of the will and trustee of the resulting trust.

In his capacity as trustee, Steven filed a petition in the circuit court requesting aid and guidance because his brother, Bradshaw, the beneficiary of the trust, "is currently incarcerated at River North Correctional Center under a life sentence." Steven requested that the circuit court permit him to resign and either appoint a replacement trustee or simply terminate the trust and disburse the trust funds directly to an inmate trust account maintained for his brother's benefit. Since Bradshaw was incarcerated as the result of a felony conviction, the circuit court first appointed a guardian ad litem ("GAL") to represent his interests. *See* Code § 8.01-9. The GAL subsequently filed an answer to the petition on behalf of Bradshaw. The GAL agreed to Steven's request to be removed as trustee, to terminate the trust, and to distribute the trust assets into Bradshaw's inmate trust account.

***2** Hence, the circuit court held a hearing to consider the petition. Bradshaw appeared telephonically and upon his request, the circuit court permitted him to represent himself at the hearing since the GAL failed to appear. Finding that the parties agreed to the requested relief as proposed by Steven, the circuit court granted the requested relief and directed the counsel for Steven to "prepare an order terminating the trust and pay the money over to the gentleman as we described." On October 24, 2022, the circuit court entered a final order granting Steven's motion to resign as trustee, terminating the trust, and ordering the remaining principal and income to be paid into Bradshaw's inmate trust account. The final order also awarded reasonable attorney fees and costs to the trustee's counsel "to be paid from Trust assets," and $1,250 to the guardian ad litem for her services relating to the proceeding. The record indicates that an invoice prepared by the GAL documenting her work on the case was included with the final order when submitted to the circuit court. This invoice documented that the GAL incurred $1,250 in fees at an hourly rate of $250 per hour.

After receiving a copy of the final order, on November 4, 2022, Bradshaw wrote to his GAL expressing disagreement with the award of fees and costs in the order and asking her to assist him in having the circuit court modify the order. Bradshaw, acting *pro se*, mailed a letter dated November 7, 2022, to the presiding judge, challenging the fee awards to both the trustee's counsel and the GAL, arguing that under the terms of Watson's will, Watson's estate should bear those costs.[1] In the letter, Bradshaw asked the circuit court to amend its final order, remove the awards to the trustee's counsel and the GAL, and direct that the entirety of the trust funds be paid to Bradshaw. The trustee, by counsel, responded by letter mailed directly to the presiding judge arguing that the final order correctly reflects that the trust is responsible for the costs of the litigation. Subsequently, the circuit court sent an email to the trustee's counsel and the GAL advising them that he had received a letter directly from Bradshaw, but because the GAL represented Bradshaw, the circuit court would "treat [the letter] as an ex parte communication" and was "not going to read it." Bradshaw, again acting *pro se*, appealed from the circuit court's final order before sending another letter to the circuit court, *pro se*, expanding on the arguments in his previous letter and renewing his motion to amend the final order.[2]

II. ANALYSIS

A. *Standard of Review*

"We review an award of attorney's fees for abuse of discretion." *Lambert v. Sea Oats Condo. Ass'n, Inc.*, 293 Va. 245, 252 (2017) (citing *Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 429 (2012)).

B. *This Court has jurisdiction to hear this appeal because Bradshaw had no opportunity to contemporaneously object to the order of the trial court.*

As a preliminary matter, due to the unusual procedural history in this case, we choose sua sponte to address whether Bradshaw's assignment of error was preserved for appeal. Rule 5A:18 states "[n]o ruling of the trial court ... will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." However, Code § 8.01-384 states in relevant part, "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal." "Plainly, this provision 'requires appellate courts to consider issues on appeal that do not satisfy the contemporaneous objection requirement when the litigant had no opportunity to make the requisite timely objection.' " *Jacks v. Commonwealth*, 74 Va. App. 783, 792 (2022) (en banc) (quoting *Maxwell v. Commonwealth*, 287 Va. 258, 265 (2014)). This exception applies when a litigant is denied the opportunity to make a contemporaneous objection "through no fault of his own." *Commonwealth v. Amos*, 287 Va. 301, 306 (2014).

***3** In *Maxwell v. Commonwealth*, the trial court recessed while the jury deliberated upon guilt. 287 Va. at 262. The parties left the courtroom during this time. *Id.* It later came to defense counsel's attention that during the recess, the jury made certain inquiries of the court, which the court answered without waiting for the parties to return. *Id.* at 262-63. On appeal, the Supreme Court decided that "by its plain language, Code § 8.01-384(A) prevents Maxwell from being prejudiced on appeal due to his lack of opportunity to make an objection contemporaneously with the court's act of proceeding in his absence." *Id.* at 267.

Similarly, in *Commonwealth v. Amos*, the Supreme Court addressed a situation in which the trial court held a witness in a criminal prosecution in contempt and remanded her to the custody of the sheriff without giving her any opportunity to address the court. 287 Va. at 304. The Supreme Court found that "the exception is appropriate when circumstances such as those in this case arise" and concluded that because "the actions of the trial court prevented Ms. Amos from presenting a contemporaneous objection ... the contemporaneous objection exception of Code § 8.01-384(A) applies and no further steps were required to preserve her issues for appellate review." *Id.* at 309.

Likewise, in *Jacks v. Commonwealth*, "Jacks was convicted in the general district court for driving while intoxicated." 74 Va. App. at 787. He appealed his conviction to the circuit court on June 16, 2020, more than ten days after his conviction on March 16, 2020. *Id.* The circuit court denied the appeal as untimely. *Id.* Jacks noted an appeal arguing that because emergency orders issued by the Supreme Court in response to the Covid-19 pandemic tolled the filing deadline of Code § 16.1-132, the circuit court's denial of his appeal was in error. *Id.* Sitting en banc, this Court concluded that:

> Jacks had no opportunity to object to the circuit court's ruling at the time it was made. Because the circuit court mistakenly believed Jacks's appeal was untimely, it denied the appeal *sua sponte*, without a hearing, and outside the presence of Jacks or his counsel. In that way, Jacks lacked an opportunity to make a contemporaneous objection not through any fault of his own, but rather because the circuit court misunderstood the relevant procedural law when Jacks noted his appeal.

Id. at 792 (internal citations omitted).

Here, Bradshaw received the already executed final order of the circuit court. He did not see a draft of the order prior to its entry, nor does the record indicate that he had any contact with his GAL before she signed and submitted the final order to the circuit court for entry. Upon receiving a copy of the final, entered order, Bradshaw drafted a letter to the circuit court stating his objections to the final order and requesting that the circuit court reconsider the order. Upon receipt, the circuit court refused to read the letter, construing it as an ex parte communication. Bradshaw also wrote to his GAL expressing his objections to the order and requested her assistance in achieving a modification of the order. We note that the record is bereft of any indication that the GAL ever attempted to raise Bradshaw's concerns with the circuit court. Thus, Bradshaw was unable to make his objection known to the circuit court. This unfortunate situation occurred as a result of the circuit court reasonably failing to read the letter constituting an objection because Bradshaw was represented by a GAL who failed to bring the concerns of her client before the circuit court after being requested to do so by her client. Based on these unique facts, we find that Bradshaw, through no fault of his own, was denied the opportunity to contemporaneously object to the order of the circuit court. Therefore, pursuant to Code § 8.01-384(A), the appeal of the award of attorney fees and costs as well as the award of GAL fees was preserved, and this assignment of error is properly before this Court and will therefore be addressed on its merits.

C. *The circuit court did not abuse its discretion in awarding reasonable fees and costs.*

***4** Bradshaw contends that the circuit court abused its discretion by including in its final order an award of attorney fees and costs to be paid from the corpus of trust funds. Bradshaw makes three arguments in support of this position: (1) that the circuit court's oral pronouncement upon the conclusion of the hearing did not include this award, and therefore its inclusion in the written order was error; (2) the terms of the will which created the trust forbade payment of costs and fees from the trust corpus; and (3) that the fees awarded were unreasonable.[3] We disagree.

Bradshaw presents several cases, many from federal courts, supporting his basic proposition that because a defendant has a right to be present when he is sentenced, "if a conflict arises between the orally pronounced sentence and the written judgment, then the oral sentence controls." *United States v. Rogers*, 961 F.3d 291, 296 (4th Cir. 2020) (citing *United States v. Diggles*, 957 F.3d 551, 555, 557 (5th Cir. 2020)). He argues that the circuit court failed to award any attorney fees, GAL fees, or costs by pronouncement from the bench during the hearing and therefore any award of attorney fees, GAL

fees, or costs in the final order was in error. However, the cases cited by Bradshaw specifically apply only to criminal sentencing and have no bearing upon this strictly civil matter.

Bradshaw also contends that the terms of the will required that the payment of the subject fees and costs were to be paid from Watson's residuary estate not from the trust corpus. We disagree.

Bradshaw relies upon three provisions in Watson's will. First, Bradshaw relies on Article I's provision: "I direct that all of my lawful unsecured debts, funeral expenses, expenses of my last illness, expenses of administration and taxes owed by my estate whether as a consequence of my death or otherwise, be paid out of my residuary estate without apportionment among the beneficiaries of my estate." Bradshaw contends that the attorney fees, GAL fees, and costs awarded by the circuit court in the final order are "expenses of administration" within the contemplation of Article I and therefore are to be paid out of the residuary of Watson's estate rather than the trust corpus. However, Bradshaw cites no authority for this interpretation of the will. Since Article III created the trust, we find that the plain meaning of Article I applies to the expenses of administering the decedent's estate, not the expenses in administering the trust created for Bradshaw's benefit.

Bradshaw next cites to Article III of the will: "[t]o the extent permitted by law, neither the principal nor income shall be liable for the debts of any beneficiary." Read in conjunction with the aforementioned provision in Article I along with the allocation of $50,000 to a trust for Bradshaw's benefit, Bradshaw seemingly argues that he was entitled to take the trust assets free and clear of any costs and that the fees and costs awarded by the order were "debts of the beneficiary [Bradshaw]" within the meaning of Article III of the will. Once again, Bradshaw cites no authority in support of this assertion. Although we acknowledge that this provision in Article III appears to be designating the resulting trust as a spendthrift trust, generally barring Bradshaw's creditors from being able to reach the assets of the trust in satisfaction of his debts, Article III does not preclude the circuit court from awarding costs and fees from the trust principal as it has done here.

***5** Article III of the will included a provision stating: "In addition to the powers granted by law, I grant to my Trustee those powers set forth in Section 64.1-57 of the Code of Virginia, as in force from time to time, and I incorporate that Code Section in said trust by this reference." Although Code § 64.1-57 has been repealed and replaced by Code § 64.2-105(12), the new provision allows a trustee

> [t]o employ and compensate, out of the principal or income, or both as to the fiduciary seems proper, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, licensed real estate brokers, licensed salesmen, and other assistants and advisors deemed by the fiduciary to be needful for the proper administration of the trust or estate ....

This provision prevents the conclusion that Watson intended to completely insulate the $50,000 trust principal from any costs related to the trust.

In addition, Virginia law clearly contemplates trust assets being used to cover trust expenses including legal fees and costs. For example, Code § 64.2-762 provides that "[a] trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for: (1) Expenses that were properly incurred in the administration of the trust ...." Also, Code § 64.2-778(A)(15) provides that a trustee may "[p]ay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust[.]" Code § 64.2-1065(A)(5) even permits for the disbursal of trust principal to pay "an expense of an accounting, judicial or nonjudicial proceeding, or other matter that involves primarily principal, including a proceeding to construe the terms of the trust or protect property[.]"

Therefore, we are unconvinced by Bradshaw's argument that an award of attorney fees and costs was precluded by Watson's will. No provision in the will forbade the award here, and the Code of Virginia expressly authorizes payment of certain trust expenses including fees for legal proceedings and attorney fees from trust assets. Further, Watson's will, by incorporation, expressly authorized the trustee to pay attorney fees and costs from the trust assets, thus undermining any argument that the testator sought to insulate the $50,000 in trust principal from the payment of any expenses.

Finally, Bradshaw seems to assert that the award of fees and costs here was unreasonable by suggesting that the

GAL did not earn the fees she claimed and that the trustee petitioned the circuit court for his own benefit, not Bradshaw's, and therefore was not entitled to attorney fees and costs paid from the trust principal. Initially, we find that the issue of whether to award GAL fees is squarely within the discretion of the trial court. The record indicates that the trial court had the GAL's invoice before it when it decided to enter the proposed final order, and by implication the circuit court credited the invoice and found the award of fees reasonable when it entered the proposed final order. Since we cannot conclude that no reasonable jurist could have credited the invoice, and found the award of fees reasonable, we find no error.[4] Bradshaw cites various cases in which awards to executors were found to be unreasonable because the executor was acting in his own rather than the beneficiary's interest. However, once again, since we cannot find that no reasonable jurist would have concluded that his trustee acted reasonably for the benefit of Bradshaw, we decline to disturb the payment of the attorney fees and costs incurred by the trustee from the trust principal.

III. CONCLUSION

***6** Thus, we disagree with Bradshaw's contention that the circuit court abused its discretion in awarding reasonable costs and fees to the trustee and guardian ad litem from the trust corpus and affirm the order of the circuit court.

Affirmed.

Causey, J., dissenting.

Bradshaw was not a party to this suit. The trial court exceeded its authority in assessing fees against Bradshaw by erroneously appointing a GAL for Bradshaw, finding that Bradshaw's GAL rendered "substantial service" as required by Code § 8.01-9, and awarding fees that neither the GAL nor petitioner's counsel argued at trial in violation of Bradshaw's constitutional right to due process. Furthermore, the trial court erred by not performing a colloquy before allowing a person it had found to be incapacitated (Bradshaw) to proceed without counsel. For these reasons, I respectfully dissent.

I. Fees

A. Petitioner's Attorney Fees

It was error for the trial court to award attorney fees to petitioner's counsel to be paid by the nonparty, Bradshaw. Our Supreme Court has clarified that "[w]hile '[a]n executor may, in good faith, seek the aid of counsel in the [e]xecution of his duties,' he is not entitled to attorneys' fees and legal costs simply because they were incurred in good faith." *Galiotos v. Galiotos*, 300 Va. 1, 12-13 (2021) (second and third alterations in original) (quoting *Clare v. Grasty*, 213 Va. 165, 170 (1972)). "The attorneys' fees and costs must be for services that aid the executor in the performance of his duties and are beneficial to the estate." *Id.* at 13; *see also* *O'Brien v. O'Brien*, 259 Va. 552, 557-58 (2000) (holding that an executor was rightfully denied attorney fees because the fees "were incurred for his personal benefit and not to benefit the estate or to aid him in his duties as an executor").

Here, it was an abuse of discretion to find that petitioner's counsel services aided the executor in the performance of his duties. Bradshaw did not contest Steven's course of action in resigning as executor and terminating the trust. Further, as reflected in the record, the trial court reached out to the parties, noting that "there seems to be an agreement that the trust should be terminated." The trial court went on to inform the parties that if they submitted an agreed order to that effect, the court would enter the order and the hearing would not be necessary. Ultimately, the hearing went forward, and as the transcript reflects, Bradshaw did not contest the termination of the trust nor the distribution of funds to his inmate account. Although the trustee may have brought this petition in good faith, petitioner's attorney fees and costs did not aid the trustee in his performance of his duties. Petitioner's course of action was uncontested by Bradshaw and forcing Bradshaw to bear these unnecessary legal fees is unjust. Simply put, there was no need for aid and direction because the court and the parties agreed prior to the hearing. Therefore, I would find that it was an abuse of discretion to award both the GAL fees and the petitioner's attorney fees.

B. GAL Fees

Bradshaw was appointed a GAL under Code § 8.01-9. As a preliminary matter, the Virginia legislature has provided a right to counsel in civil cases for defendants under a disability. *See* Code § 8.01-9. Code § 8.01-9 allows the appointment of a GAL—and the assessment of fees for that GAL—only for "[a] suit wherein a person under a disability is a party *defendant.*" (Emphasis added). A " '[p]erson under a disability' ... include[s] ... a person convicted of a felony during the period he is confined." Code § 8.01-2. However, in this case, the trial court erred when it appointed a GAL for Bradshaw. Despite his incarceration, Bradshaw does not qualify for a GAL under § 8.01-9 because he was not a defendant. Moreover, Bradshaw was not even a named party. Bradshaw appeared as the beneficiary of the trust, concurring with the trustee's petition to the court. As he was not a named defendant, the court cannot assess Bradshaw the GAL fees under Code § 8.01-9.

***7** Since Bradshaw is not a defendant in this matter the trial court abused its discretion in finding him eligible to a right to counsel and appointing a GAL to represent him under Code § 8.01-9. Therefore, Bradshaw should not have to bear the burden of cost of counsel he never requested, never received, and was never authorized to be assigned under Code § 8.01-9. Indeed, any interpretation that Code § 8.01-9 automatically entitles all incarcerated persons to a GAL in their civil suits, regardless of whether they are a defendant or other party, would lead to an inequitable result. Although ideal, it would also provide incarcerated people with a blanket civil right to counsel that is badly needed, yet denied, for many law-abiding Virginia citizens.

Bradshaw is not a party to the case and should not be assessed any fees as a nonparty. Costs and fees in any case should only be assessed against the named parties. Here, a petition was filed by a trust's executor for aid and direction. Bradshaw himself was not ever named as a party to this suit. Although the petition was served on Bradshaw because he was the sole beneficiary of the trust, the record is void of any evidence of him being a named party before the trial court. And as noted by the court, they agreed. Therefore, if Bradshaw did not file the suit nor is he listed as a defendant/party, he should not be held responsible for *all* fees and costs associated with the suit.[5]

Even if Code § 8.01-9 did permit the GAL's appointment, the GAL in this matter failed to meet the statutory burden of rendering "substantial service" in representing her client's interests in order to receive compensation.

> When, in any case, the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow the guardian reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of the defendant.

Code § 8.01-9. In this case, there is no such finding in the court order granting the GAL's fees, no argument for GAL fees, and one would be hard pressed to find facts in the record that support a finding that such substantial services existed.

After being appointed, the GAL filed a half-page reply to the petition for aid and direction, failed to appear at the sole video/telephonic hearing, and filed a response to this appeal agreeing with the appellee—against her client's interests. Meanwhile, Bradshaw filed his own initial answer to the petition for aid and direction, filed his own motion to allow himself to appear for the court proceedings via video conference, represented himself at the hearing, attempted to lodge his objections with the court, and has defended his own appeal. The GAL's failure to attend trial or relay a client's valid objection to the court order could be considered a per se failure to render substantial services to a client.

Based on the record before this Court, there is no evidence to support that the GAL fulfilled the requirement of Code § 8.01-9 that the GAL render "substantial service in representing the interest" of Bradshaw and, therefore, her fees may not be awarded.

C. Attorney Fees versus Trust Expenses

***8** The majority errs by couching the trial court's award of attorney fees as trust expenses. "It is well-established that a court speaks only through its written orders." *S'holder Representative Servs., LLC v. Airbus Ams., Inc.*, 292 Va. 682, 690 (2016). Here, the court did not expressly find that the attorney fees were trust fees, it simply directed that the fees be paid out of trust assets. Without a finding that the attorney fees were trust expenses, this Court may not affirm the award on appeal.

Furthermore, the court order made an award of "reasonable attorneys' fees" to petitioner's counsel without any argument or evidence of attorney fees being presented at trial. Additionally, this award was not included in the judge's ruling from the bench. "[A]n attorney who seeks to recover legal fees ... must establish, as an element of the attorney's *prima facie* case, that the fees charged ... are reasonable." *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623 (1998) (second and third alterations in original) (quoting *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93, 96, (1997)).

> In determining whether a party has established a *prima facie* case of reasonableness, a fact finder may consider, *inter alia*, the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Id. Although the trial court made an award of reasonable attorney fees, there is no evidence in the record to support that the attorneys in this case ever established a prima facie case of reasonableness. No evidence was presented or heard at trial. In fact, the transcript of the hearing in this matter is void of any mention of attorney fees. Furthermore, Bradshaw did not receive any notice of the award of attorney fees prior to receiving a copy of the executed order and never had a chance to object to the award. Therefore, it was error for the trial court to award attorney fees without the attorney establishing their prima facie case for the fees.

Unlike the majority, I do find Bradshaw's argument convincing that if attorney fees should be paid, they must be paid out of the residuary of the estate, not the principal of the trust. As noted above, this was an uncontested proceeding to remove Steven as trustee and terminate the trust. Bradshaw did not object to this course of action, and the court even noted that the parties seemed to agree regarding the disposition of the trust. Therefore, I agree that if anything this was an expense of the administration of the estate, not a necessary trust expense. Again, there was no need of aid nor direction. Accordingly, I would find that if attorney fees must be granted, they must be granted from the residuary estate, not the principal of the trust.

D. Bradshaw's Due Process Constitutional Right

Furthermore, attorney fees cannot be retroactively awarded without evidence or testimony presented at trial. At the conclusion of the hearing, the trial court asked petitioner's counsel to "prepare an order terminating the trust and pay the money over to the gentleman as described." Counsel responded that he would prepare the order and "circulate it, and [he would] bring [the GAL] up to speed as well." Following this exchange, there was a lengthy discussion regarding the proper place and manner for both the order and the funds to be sent to Bradshaw. Notably, the issue of attorney fees was never brought to the trial court's attention, and no affidavit of attorney fees incurred was submitted. Counsel drafted an order, which the trial court subsequently signed, which did not reflect the court's ruling from the bench as memorialized in the trial transcript—instead, the order counsel drafted added two provisions requiring Bradshaw to pay an open-ended "reasonable fee" not articulated at trial or in evidence. Trustee's counsel retained $6223.50 for these purposes.

***9** Clearly, the written order is not the same as the judge's ruling from the bench. As a preliminary concern, the court should be able to trust the attorneys practicing before it to transcribe judicial orders that accurately reflect what was ordered—and only such concessions as were ordered—at trial. As a secondary concern, the addition of elements into a judicial order that constitute considerable deprivations of property, without putting a party on notice or providing an opportunity to be heard, creates a constitutional due process violation.

The Supreme Court of the United States "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *see also* *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) ("The requirement for some kind of a hearing applies to the taking of private property."). "[T]he 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 (1951) (Frankfurter, J., concurring).

This due process interest is explicit not only in the Fifth Amendment of the United States Constitution, but also the Constitution of the Commonwealth of Virginia's guarantee "[t]hat no person shall be deprived of his life, liberty, or property without due process of law." Va. Const. art. I, § 11; U.S. Const. amend. V. This fundamental principle of our justice system requires that Bradshaw be given notice and the opportunity to be heard on the matter of these significant attorney fees. *See Mathews*, 424 U.S. 319. Attorney fees should not be slipped into a judicial order after a hearing in which both attorneys failed to request them or submit evidence of them. To surprise Bradshaw with attorney fees in entry of the order, from an undisputed hearing for petition for aid and direction, is not warranted here.

II. Intelligent and Voluntary Waiver of Right to Counsel

The trial court further erred by allowing Bradshaw to waive the right to counsel (the GAL) during the hearing and represent himself. Once it ruled that Bradshaw required a GAL, the court was obligated to ensure that his right to that counsel was upheld during the pendency of the proceedings. Although the right to counsel is a fundamental constitutional right in criminal cases, a defendant may decide to waive his Sixth Amendment right to counsel. *Faretta v. California*, 422 U.S. 806, 814 (1975). However, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). "To be valid, any such waiver must be the voluntary act of the defendant and must constitute a knowing and intelligent abandonment of a known constitutional right or privilege." *McNair v. Commonwealth*, 37 Va. App. 687, 695 (2002) (citing *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)).

In addition to the constitutional protections regarding waiver of the right to counsel, the General Assembly further prescribed the necessary steps for waiver in the Commonwealth of Virginia. The Code of Virginia requires that when a person, who is not represented by counsel, is accused of a crime for which incarceration may be the penalty the court is required to "ascertain by oral examination of the accused whether or not the accused desires to waive his right to counsel." Code § 19.2-160. If the accused chooses to waive his right to counsel and the court determines that such waiver is voluntarily and intelligently made, the court is required to provide the accused with a statement to be signed by the accused to document his waiver. *Id.* The waiver of right to counsel is detailed in the Code of Virginia and strictly adhered to in court proceedings.

***10** Here, the trial court made no determination that Bradshaw voluntarily, knowingly, or intelligently waived his right to counsel. The trial court, on its own volition, found it necessary to appoint a GAL for Bradshaw. However, the same trial court who found that Bradshaw required a GAL also found it appropriate to proceed in the GAL's absence.[6] The trial court did so without asking Bradshaw a single question regarding his waiver of right to counsel. Once petitioner's counsel was unable to establish contact with the GAL, Bradshaw asserted, "Your Honor, I'm prepared to proceed without [the GAL]," to which the court responded, "Yeah. I was going to say--go ahead sir. Go ahead sir." Thus, the trial court finding Bradshaw incapacitated and classifying him as under a disability, then allowing him to proceed without offering even a brief colloquy regarding the waiver of right to counsel, was an abuse of discretion. I would hold that the same colloquy required for a criminal defendant to waive their right to counsel in the Commonwealth of Virginia should also be required in civil cases where there is a right to counsel. Summarily, when a statute requires the right to counsel, the statute inherently also requires a knowing, voluntary, and intelligent waiver of that right to counsel. To hold otherwise would fail to effectuate the intent of the statutory protections provided to civil defendants by Code § 8.01-9.

III. Right to Civil Counsel

Finally, all civil defendants should be entitled to the right to counsel, regardless of disability. Code § 17.1-606 allows circuit courts in the Commonwealth of Virginia to assign counsel to any person who is

> (i) a plaintiff in a civil action in a court of the Commonwealth and a resident of the Commonwealth or (ii) a defendant in a civil action in a

> court of the Commonwealth, and who is on account of his poverty unable to pay fees or costs, may be allowed by a court to sue or defend a suit therein, without paying fees or costs.

The statute further provides that the person "shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees, except what may be included in the costs recovered from the opposite party." *Id.*

A study titled "Virginia Self-Represented Litigants Study," published by the National Center for State Courts, found that most civil cases in the Commonwealth have at least one unrepresented party. John E. Whitfield, *The Sobering Findings of the Virginia Self-Represented Litigants Study*, Va. Lawyers Weekly, June 2018, at 20. According to this study "[t]he traditional court model, in which both parties have legal representation, occurred in only one percent of district court cases." *Id.* at 21. The study also found that in juvenile and domestic relations district courts "neither party had representation in 87 percent of the cases, and only six percent of adult cases involved counsel representing both sides." *Id.* Further, the study found that in circuit court, 38 percent of cases had counsel for both parties. *Id.* In a sobering reality, the study revealed that "the greater extent of poverty in a locality, the more likely it is that parties would be unrepresented." *Id.* at 21-22. Not surprisingly, the study found that "[r]epresentational status has a clear impact on case outcomes, particularly when only one side or the other is represented." *Id.* at 23.

While the General Assembly has allowed for access to counsel in civil suits, as discussed above, many litigants are left to endure the legal system without the assistance of counsel. In this case however, simply because Bradshaw is incarcerated it is presumed that he is entitled to counsel in his civil suit. However, law abiding citizens are routinely denied access to counsel in their civil trials. Persons who are at risk of losing their home, children, employment, subject to garnishments, and various other civil suits are often forced to proceed without the assistance of counsel. But here, Bradshaw, who is serving a life sentence for taking the life of another, was presumed to have the statutory right to an attorney in his civil trial and received said counsel. Courts should more liberally use their powers under Code § 17.1-606 to protect law-abiding Virginia citizens in their civil suits and ensure equal access to justice in civil trials.

CONCLUSION

***11** For these reasons, I would find that the trial court erred by appointing a GAL for Bradshaw under Code § 8.01-9 because he was not entitled to counsel pursuant to this statute. I would also find that the trial court abused its discretion by awarding costs, GAL fees, and attorney fees to be paid by a nonparty in a suit, without notice. Bradshaw should not have to bear the cost of a suit that he did not bring and did not name him as a party. Further I would find that the trial court erred by not performing a colloquy to determine that Bradshaw was making a voluntary, knowing, and intelligent waiver of counsel. Therefore, I would reverse the trial court's award of the GAL and petitioner's costs and attorney fees and remand this case for further proceedings, consistent with this dissent.

All Citations

Not Reported in S.E. Rptr., 2024 WL 780603

Footnotes

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

1 The GAL and counsel for the trustee are listed in the letter as recipients of carbon copies.

[2] Bradshaw's GAL did not file a motion to amend on his behalf.

[3] The dissent finds error with the trial court because Bradshaw was not a named party to the case and therefore could not have costs assessed against him. The dissent also finds the trial court erred by allowing Bradshaw to continue pro se at the hearing without first properly examining if his waiver of counsel was sufficiently knowing and intelligent. Bradshaw does not make these arguments, nor does his assignment of error encompass either. Therefore, we do not consider them. Rule 5A:20(e).

[4] The dissent specifically relies upon the substantial service requirement of Code § 8.01-9 to conclude that the trial court erred in granting the GAL fees. We note that Bradshaw does not invoke Code § 8.01-9, and therefore we do not apply it. Rule 5A:20(e).

[5] In other states, courts have likewise held that nonparties may not be assessed attorney fees in various cases. *See, e.g.*, *Hartloff v. Hartloff*, 745 N.Y.S.2d 363 (N.Y. App. Div. 4th Dept. 2002) (holding that the trial court did not have jurisdiction to assess counsel fees, costs, and sanctions against nonparties, where the nonparties had not been named as defendants in the action, had not been served with process notifying them of any claim for money damages, and had not been afforded the opportunity to defend such claim). *See also NRD Partners II, L.P. v. Quadre Investments, LP*, 875 S.E.2d 895, 899 (Ga. Ct. App. 2022) (holding that the trial court could not award attorney fees against a nonparty in a contempt sanction).

[6] The GAL acknowledged receipt of the notice of hearing and even noted she planned to appear in person to make it easier to communicate with Bradshaw. The record makes it clear that both petitioner's counsel and the trial court believed the GAL would be appearing in person the day of the hearing. In fact, counsel for the petitioner tried to reach the GAL at the start of the proceedings, however, her phone went straight to voicemail. There is no evidence in the record to support that the GAL notified anyone that she could no longer attend the proceeding.