

# **What to do When the Guardian ad Litem Does Not Sign the Notice of Appeal?**

## **Introduction**

Who should sign the notice of appeal? If the trial attorney signs it, no problem. If the appellant signs it instead of the guardian ad litem, problem! And it won't go unnoticed.

## **The Law**

When a guardian ad litem has been appointed for a party, that party must appear by the guardian ad litem. (See Code Civ. Proc., sec. 372.) This means that any appeal – except for an appeal challenging the validity of the order of guardianship itself – must be taken by the guardian ad litem. (See *In re Moss* (1898) 120 Cal. 695, 697.) No court has authority to disregard this statutory requirement. (See *Siegal v. Superior Court* (1962) 203 Cal.App.2d 22, 27.)

## **Defect in the Notice of Appeal**

When a client is appointed a guardian ad litem in the superior court due to the client's incompetent mental state, the guardian ad litem must sign the notice of appeal. If the client signs the notice of appeal, the superior court might process it as a "normal" appeal. In turn, the Court of Appeal may appoint counsel to represent the appellant, still unaware of the defect in the notice of appeal. However, once the Court of Appeal becomes aware of the problem, it will likely dismiss the appeal based on the appellant's lack of capacity.

## **Fixing the Defect and Saving the Appeal - File a Motion to Construe the Notice of Appeal**

A motion to construe the notice of appeal is an appropriate filing by appointed counsel for this appellant. While exposing the defect to the court, it is likely that the court will construe the notice liberally allowing the appeal to go forward. Conversely, the risk of not resolving the defect means ultimate dismissal of the appeal. Obtain a declaration from the guardian ad litem in support of appellate review. Pursuant to Code of Civil Procedure section 909, the court may exercise its discretion to consider the contents of this declaration. But, since the court cannot disregard the statutory requirement that the appellant appear in the appeal by the guardian ad litem, it is not enough that the guardian merely "agree" with the appeal.

Instead, it can only go forward with the appeal if the court will "construe" the appeal as having been taken by the guardian ad litem, rather than by the appellant personally. It is your job to convince the court to consider the declaration. Your first step is to talk with the guardian ad litem. Did the GAL "encourage" the client to file the notice of appeal and seek review? Does the GAL "wholly support and endorse" the client's efforts to obtain appellate review? Does the GAL

“continue to support the appeal”? Did the GAL realize that it was s/he who should have signed the notice of appeal

1? If not, would s/he have done so if they had realized that was needed?

### **The Motion to Construe the Notice of Appeal**

A “notice of appeal must be liberally construed.” (Cal. Rules of Court, rule 1(a)(2).) Moreover, a notice of appeal is valid if it is signed by “any person, attorney or not, who is empowered to act on [the] appellant’s behalf.” (Seeley v. Seymour (1987) 190 Cal.App.3d 844, 853.) And there is a “strong public policy in favor of hearing appeals on their merits.” (Jarkieh v. Badagliacco (1945) 68 Cal.App.2d 426, 431.) The court has every reason to treat the appellant’s case as having been taken by the guardian ad litem on their behalf – give it justification to do so. \*\*\*