

H032619

IN THE COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JEFFREY R. GOLIN, ELSIE Y. GOLIN and NANCY K. GOLIN,
Plaintiffs and Appellants,

vs.

CLIFFORD B. ALLENBY, ET AL.,
Defendants and Respondents.

Appeal from the Judgment of the Superior Court of California
County of Santa Clara

Honorable J. Michael Byrne, Presiding

Case No. 1-07-CV-082823

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondents have passed up another opportunity to explain what brings this case within the reach of the vexatious litigant statutes. Still, they still fail to point to a single frivolous pleading filed by the Golins. More importantly, they ignore the fact that the court below never found that the Golins filed frivolous pleadings.

Respondents allege but fail to show that the Golins have engaged in repeated litigation. They ignore principles of issue preclusion and claims preclusion that defeat their arguments.

Substituting for legal analysis, respondents' arguments largely consist of *ad hominem* attacks directed to the Golins and their counsel. In making their arguments, respondents stray far from the record.

Finally, respondents misrepresent the record throughout their arguments.

II. APPEALABILITY

This case is appealable under the provisions of CCP 904.1(a)(1), as an appeal from a final judgment, following entry of dismissal after the court determined the Golins to be vexatious litigants and the Golins failed to furnish a bond. A vexatious litigant designation, by itself, is not an appealable order, but a dismissal, for failure to provide a bond required by a vexatious litigant order, is, and all interlocutory orders that resulted in a dismissal are reviewable (CCP §906), *Childs v. PaineWebber*

Incorporated (1994) 29 Cal.App.4th 982.

Respondents filed a notice with this court¹ claiming that the appellants had failed to comply with a required CCP §391.7 pre-filing order, and suggested this court dismiss the appeal, citing *Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12 Cal.App.4th 838 and *In re Natural Gas Anti-Trust Cases* (2006) 137 Cal.App.4th 387, 394. (RB 7-8). The Golins promptly objected,² noting that §391.7(a)³ only bars litigation *in pro per*, and here the Golins are represented by counsel. (AR1, p4 ¶2⁴).

In their brief, respondents renew these arguments relying primarily on *Camerado*, which does not help them. *Camerado* makes clear, “[t]he prefiling order authorized by section 391.7 is a powerful weapon to battle the vexatious litigant. It is

¹ Notice Re: Appellants’ Vexatious Litigant Status; Prefiling Order (“AN1”), filed in this Court on March 6, 2008,

² Appellants’ Response to City of Palo Alto’s Notice Re. Vexatious Litigant Status; (“AR1”), filed in this Court March 17, 2007.

³ CCP §391.7(a): “In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state *in propria persona* without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.” (emph. added.) Judge Byrne entered a pre-filing order on December 11, 2007.

⁴ “The Golins will be represented by counsel at all times during this appeal. Mr. Go-
(footnote continued-→)

not inconsistent with the broad reach of the vexatious litigant statute that the Legislature chose to limit this weapon to pro se vexatious litigants. *Id.*

Respondents have not filed a motion to require a bond as a condition to prosecuting this appeal. No bond should be required since the trial court's judgment is stayed on appeal by operation of law. (See CCP §916(a)). Nothing in *McColm v. Westwood Park Association* (1998) 62 Cal.App. 4th 1211 undermines this conclusion since that case merely stands for the proposition that an appeal counts as "new litigation" for purposes of pre-filing orders under CCP 391.7. Insofar as *McColm* required a pre-filing-order and bond, it is distinguishable from this case because the appellant in *McColm* had been declared a vexatious litigant in *other* litigation and was not appealing that designation in the instant case in question before the court. Here, the Golins do appeal their designation as vexatious litigants and their pre-filing orders.

No published case explicitly addresses the question whether a plaintiff who appeals an order under the vexatious litigant statutes can be required to comply with a pre-filing order or furnish security when the appeal is taken to challenge that status. This court apparently did not require such compliance when a *pro per.* appellant challenged such an order in another case. *Morton v. Wagner* (2007) 156 Cal.App.4th

lin does not appear in this case representing himself.”

963. Respondents have not pointed out any contrary authority. Respondents' request that the appeal be dismissed should be denied because it is unsupported by any legal authority

III. STANDARDS OF REVIEW

The sufficient⁵ evidence standard of review generally applies to reviews of findings of fact, and here to finding of facts supporting a vexatious litigant determination (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 969, citing *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219)

“Because the trial court is best situated to receive evidence and hold hearings on the question of whether a litigant is vexatious, on appeal, we are required to presume the order declaring a litigant vexatious is correct and to imply findings necessary to support that designation. (*Bravo*, supra, 99 Cal.App.4th at p. 219....) Of course, we can only imply such findings where there is evidence to support them. *Where there is insufficient evidence to imply findings in support of the designation, reversal is required.*” (*Roston v. Edwards* (1982) 127 Cal.App.3d 842, 848) (*Emph. added*)

However, this standard is far from insurmountable. As the court states in

Morton:

“This discretion, while broad, is not unfettered. Here, the evidence does not support the finding that appellant's motions were so numerous, ‘unmeritorious’ or ‘frivolous’ as to come within the meaning of the vexatious litigant legislation.” *Id.* at 972.

⁵ Some cases cite “sufficient evidence” and some “substantial evidence.” There is no difference.

While the trial court's determination of factual disputes is subject to the substantial evidence standard, questions of law are reviewed *de novo*. *In re Charlisse C.* (2008) 45 Cal.App.4th 145, 159. Legal issues arising in this case which are reviewed *de novo* include the application of the doctrines of collateral estoppel and res judicata and dismissal of Nancy's claims without notice or opportunity to be heard. A disposition based on an error of law constitutes an abuse of discretion. *Id.*

IV. LEGAL ARGUMENT

A. RESPONDENTS FAIL TO SATISFY THEIR BURDEN TO SHOW THAT THIS ACTION IS PRECLUDED BY EARLIER FEDERAL COURT AND PROBATE COURT RULINGS

The issue whether collateral estoppel applies is a question of law that is reviewed *de novo*. *Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 618. The party who asserts the bar of collateral estoppel bears the burden of demonstrating each of its elements. *Id.* at 617, citing *Lucero v. Superior Court* (1990) 51 Cal.3d. 335, 341.

1. Respondents Have Waived this Court's Consideration of their Arguments

Respondents insist that the Golins are relitigating issues determined against them in earlier federal and probate court proceedings. RB 32-35. But their argument is bereft of *any* citation to authority. Respondents violate the well-established rule that every brief must contain a legal argument with citation of authorities on the points made, and if none is furnished on a particular point, the court may treat it as

waived and pass it without consideration. *People v. Ramirez* (2006) 39 Cal. 4th 398, 441, *rehearing denied, certiorari denied* 127 S.Ct. 2877.

Respondents refer to the term “res judicata” only once in their brief. RB p. 50. They do not address collateral estoppel at all. These doctrines are central to the notion that the Golins are vexatious under Section 391, subdivision (b)(2) because if the doctrines do not apply, it cannot be said that the Golins have relitigated at all. Rather than address these arguments, respondents assert that they don’t matter because the Golins are vexatious under subdivision (b)(3). RB 50.

Since respondents have the burden to establish that the Golins are relitigating claims or issues resolved in other proceedings and failed to meet that burden by making a legally sufficient argument, the court should find that respondents have waived the argument.

2. Judge Byrne Found There Was No Repeated Relitigation

To his credit, at the end of oral argument on November 20, 2007 even Judge Byrne cast doubt that respondents had proven their case that the Golins met the test for vexatiousness on the grounds of repeated relitigation in pro per according to CCP 391(b)(2), as distinguished from (b)(3), leaving one to wonder how it sneaked into the final order at all:

(THE COURT):

4 Mr. Beauvais is probably pretty close to
5 convincing me that **number 2** under 391 of the Code of Civil

6 Procedure is probably not the proper standard. **We don't**
7 **have repeated relitigations.** We **may have** partial
8 relitigation. ...

(contrast with:)

15 But where I see -- see, the problem in this
16 particular case is as to **section number 3** as to the person
17 acting -- reportedly filing unmeritorious motions, pleadings
18 and other papers. I'm really -- what's happening is when
19 you have 16 volumes of files before the case has gotten
20 through pleadings, numerous times -- hard for me to count
(Boldface added.) RT 11/20/07 p.70

Afterwards, respondents presented him with a proposed order listing *both*
(b)(2) and (b)(3), and Judge Byrne perfunctorily signed it, without evidence to sup-
port it.

3. The Probate Proceedings Have No Preclusive Effect

Respondents state correctly “the Probate Court was called upon to determine who should properly exercise legal responsibility for Nancy Golin.” RB 32. That being the limit of what the court had to decide, its duty manifestly did not extent to other areas of concern addressed in this lawsuit including: the claim that respondents abducted Nancy illegally and held her without judicial process; claims that Nancy has been abused and neglected for years in respondents’ care since the probate trial; claims that the Golins were falsely arrested and prosecuted; and claims that they were the victims of libel and slander. Nothing in Judge Martin’s statement of decision refers to or purports to decide any of these issues.

Respondents assert erroneously that Judge Martin did reach conclusions with

respect to these issues but a careful reading of the statement of decision shows otherwise. CT 4638-4655. For example, Judge Martin does not discuss Nancy's abduction at all. He does not address the false arrest claims or allegations of libel or slander. He makes no findings concerning the Golins' claim of an illegal search.

Moreover, as the Golins point out in their opening brief, respondents must show more to win their collateral estoppel argument. They must also show that Judge Martin *necessarily* decided the issues, which respondents seek to preclude from relitigation in this action. AOB p. 20. The need for a conservatorship having been conceded, Judge Martin only had to decide who the best conservator would be. An ensuing judgment in this action favorable to the Golins would not impeach in the slightest the findings made by Judge Martin. For that reason, the Golins are not barred from litigating any of the issues raised in this lawsuit.

4. The Federal Action Has No Preclusive Effect

Respondents also assert that the federal court order dismissing the Golins' claims is entitled to preclusive effect. RB 35. But the federal action was dismissed for procedural reasons and did not constitute a judgment on the merits of the Golins' claims. The court decided that Nancy could not appear without a lawyer and that the federal courts did not have jurisdiction to grant the Golins' custody of Nancy or to intrude in state judicial proceedings. CT 4671-4684. The court further declined to exercise jurisdiction over the Golins' supplemental claims arising under state law and noted that the Golins could pursue them in state court. CT 4683.

While the district court's order is confusing in addressing the question of the Golins' authority to act as Nancy's guardian ad litem or next friend, where she had a conservator who the Golins were suing in that action, the court resolved that question by noting that the Golins could not act as Nancy's counsel and therefore her claims could not proceed. CT 4677. The court also ruled that the Golins' claims against the state actors were barred by federal abstention doctrines. CT 4678-4682.⁶

Respondents point to the part of the district court order addressing the Golins' claim for malicious prosecution. RB p. 34. The district court noted that a malicious prosecution claim brought under 42 U.S.C. section 1983 must meet state law elements of the tort. CT 4683, lines 5-6. Next the court determined that the Golins had not shown lack of probable cause or favorable termination. CT 4683, lines 7-17.

The Golins had no obligation to show anything in opposition to a motion to

⁶ The Golins sought custody of Nancy in the federal action. The court found their claim to be barred under the Rooker-Feldman doctrine, which precludes federal district courts from reviewing final state court judgments. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923), *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). The court also found the Golins claims barred under the Younger doctrine, which, subject to a few narrow exceptions, precludes federal court interference in ongoing state judicial proceedings. *Younger v. Harris*, 401 U.S. 37, 42 (1971). In the current action, the Golins have abandoned their claim for custody of Nancy recognizing that custody issues must be addressed in the probate court.

dismiss under Federal Rule FRCP Rule §12(b)(6), a motion akin to a demurrer, which tests only the adequacy of a pleading. Under California law, lack of probable cause may be pled generally. *Hardy v. Vial* (1957) 48 Cal.2d 577, 584. The Golins in the current action allege both lack of probable cause and favorable termination. CT 358-360. As to favorable termination, the VAC recites a detailed history of the criminal proceedings and alleges that Mr. Golin was exonerated. CT 360, lines 26-28.

The adequacy of pleading is purely a question of law. *Domebedian v. Mercury Ins. Co.*, (2004) 116 Cal.App.4th 968, 994. And this court is not required to give deference to a federal court's interpretation of state law. *Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 621, 622 [court declined to give collateral estoppel effect to earlier contrary federal decision where the issue for which preclusion was sought involved only a question of law].

Since the federal decision did not reach the merits of the Golins' claims, their current action is not barred by the doctrine of collateral estoppel.

5. Number of Litigations

The respondents brief states: "Appellants' characterization of events notwithstanding, this case constitutes the third time the Golins have sought adjudication of their essential claims arising out of the events through which they lost any possible de facto custody of their daughter." RB 32. Of course, this presupposes that the

probate case concerned adjudication of these claims and for the reasons explained above, it did not.

But giving credit to respondents' count, this case still does not meet the threshold for "repeated litigation" under subdivision (b)(2) of section 391. Respondents ignore controlling authority, cited in the Golins' opening brief, which requires "at least greater than two *prior* litigations to satisfy the statute's requirement of "repeated litigation." AOB 18. *Holcomb v. U.S. Bank Nat. Ass'n*, (2005) 129 Cal.App.4th 1494. Respondents' argument does not accord with the holding in *Holcomb* and the trial court's order finding the Golins vexatious under subdivision (b)(2) must be reversed.

B. THE TRIAL COURT'S FINDING THAT THE GOLINS ARE VEXATIOUS LITIGANTS UNDER SUBDIVISION (B)(3) MUST BE REVERSED

Under CCP §391(b)(3) a vexatious litigant is a person who "[i]n any litigation while acting in propria persona repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

More than merely alleged unmeritoriousness must be determined, but "repeated motions must be so devoid of merit and be so frivolous that they can be described as a flagrant abuse of the system, have no reasonable probability of success, lack reasonable or probable cause or excuse, and are clearly meant to abuse the

processes of the courts and to harass the adverse party than other litigants.” (*Wolfram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 55). “Most cases affirming the vexatious litigant designation involve situations where litigants have filed dozens of motions either during the pendency of a single action or relating to the same judgment.” (*Morton v. Wagner*, (2007) 156 Cal.App.4th 963, 972)

At the time of the hearing on respondents’ motion, the trial court pressed them to identify the papers and pleadings repeatedly filed by the Golins that were unmeritorious. Respondents failed to identify any document in response to the court’s questioning. AOB 25-27 with citations to the record.

On appeal and for the first time ever, respondents finally have identified the documents they claim are within the statute’s purview. They reference 85 documents filed by the Golins in a list that covers nine pages of their brief. RB 17-26. The list includes practically every document that the Golins filed including initial oppositions to motions brought by the respondents. It includes the original and amended complaints, substitutions and associations of counsel (##12, 22, 40, 43, 48), a joinder with an opposition (#64), applications for appointment of counsel *pro hac vice*, applications for appointment of guardians ad litem, an order made by the court (#18), 26 opposition memoranda (##9, 15, 20, 23, 26-33, 35-39, 51, 60-65, 78, 80, 81, 83), declarations of parties and attorneys in support of oppositions (##11, 14, 64, 75-77, 83), an amicus letter in a California Supreme Court appeal (#19), motions

to change venue, requests for correction of a clerical errors (##49, 73), notices designating the record on appeal (##84, 85), a request for judicial notice of a recent case decided in this court, *Morton v. Wagner*; (#81). Although respondents finally point to the documents they are talking about, they failed to do so before the trial court and even in this court, respondents fail to show in what respect the 85 documents are so devoid of merit and frivolous that they can be described as a flagrant abuse of the system. On their face, most of them cannot be fairly characterized in the way respondents suggest. It is difficult to imagine how a substitution of attorneys or an association of counsel can be described as a frivolous pleading.

In fact, had the court examined *Respondents* defense motions it would have found them eminently meritless. Respondents' style of advocacy has been so wildly obsessive and disingenuous that any adversary would be nearly at a loss to contend with it. It is unfair to the Golins and to the court for respondents' attorneys to make such facially absurd claims and then not deliver an analysis to support them. The vexatious litigant laws were not intended to protect vexatious *defendants*. Certainly it is not the court's job to sift through the record to find evidence that the respondents are unable or unwilling to produce to support their claims. "As a general rule, the reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment." *Guthrey v. State of California*, (1998) 63 Cal.App.4th 1108, 1115.

During trial proceedings, respondents assiduously sidestepped any serious examination of the Golins individual oppositions and motions. Defendants fully recognized their *real* problem, that Golins' opposition briefs were anything but meritless. The defendants' only chance to survive the upcoming hearing on other motions filed by both sides was to bluster and bully Judge Byrne to declare the Golins vexatious before he had any time to seriously look at the record before him.

Respondents identify 26 *opposition* briefs (##9, 15, 20, 23, 26-33, 35-39, 51, 60-65, 78, 80, 81, 83) in their list of papers they allege to have been repeated, vexatious and meritless. It is hard to imagine how an *opposition brief* would be an abusive litigation tactic. They are only filed in response to *defendants'* initiatives, and there is no escape from opposing a defense motion.

Respondents' tactic of making bold meritless allegations is not new. In the trial court, the Golins brought to the court's attention this court decision in *Morton v. Wagner*, which had just been published. Mr. Pinsky, the author of respondents' brief objected to the Golins' reference to *Morton* as a prime example of their harassment of the defendants through citation of inapplicable law. (RT 11//16/07, page 29, lines 4-14). But this did not stop him from citing the very same case in support of his arguments in this court. RB 29-30.

The Golins in their opening brief addressed three categories of motions or other litigation conduct and explained why they did not act frivolously. These in-

cluded motions for appointment of a guardian ad litem and motions for change of venue AOB 7-12. They also addressed the issue of judicial disqualification. Respondents do not point to any error or misrepresentation in the procedural history which the Golins' set forth in their brief and which establish beyond all purview that the Golins' acted reasonably and with guidance from counsel in making their litigation choices. That procedural history is also damning of the respondents who acted unethically when they shopped for judges to undo orders appointing Elsie as Nancy's guardian and who continue to maintain even in this court, without reference to pertinent authority, that they were entitled to notice of hearing to appoint a GAL. Respondents offer no rebuttal to the Golins' contention that the orders vacating Elsie's appointment are void. Where appellant has stated the salient facts in his brief and such facts are not controverted by the respondent, a reviewing court may accept them as established for purposes of appeal. *Pringle v. Hunsicker* (1957) 154 Cal.App.2d 789, 796.

Rather than address the substantive issues head on, respondents instead accuse of the Golins of having caught the ire of judges in other cases and attempt to augment their showing of abusive tactics by pointing to alleged inappropriate behavior in those cases. Subdivision (b)(3) does not concern itself with litigation conduct in other cases, thus making respondents' reference to that conduct irrelevant. The Golins repeatedly objected to respondents' requests for judicial notice to establish these alleged facts. CT 4768, 5068-5069.

Judicial notice of the truth of the content of court records is appropriate only when the existence of the record itself precludes contravention of that which is recited in it, for example where findings of fact, conclusions of law or judgments bind a party for purposes of *res judicata* or collateral estoppel. (2 Jefferson, Cal.Evidence Benchbook, *supra*, Judicial Notice, §47.2, pp. 1757-1758; *In re Tanya F.* (1980) 111 Cal.App.3d 436, 440). Otherwise judicial notice for the truth of the content of court records is not appropriate either because the truth of the content is reasonably subject to dispute (1 Witkin, Cal.Evidence (3d ed. 1986) Judicial Note § 80, p. 75), or because the content is hearsay (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914; *In re David C.* (1984) 152 Cal.App.3d 1189, 1205. *Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457).

The Golins request that the court strike portions of respondents' brief that refer to litigation tactics or behaviors that are referenced in other cases including the probate court and the federal court. These include the following portions of respondents' brief: Page 10 in its entirety; the text on page 11 above the heading entitled Federal Court Proceedings; references on page 13 to disqualifications of judges in the probate proceedings; references to disqualification motions of judges and counsel in the probate court on page 38; the quoted finding of Judge Martin on page 39; the entirety of respondents' argument under the heading "3. The Court's Finding Under C.C.P. section 391 I Entirely Consistent With Appellants' Litigation Record" on pages 40 and 41.

Insofar as the Golins at times did request reconsideration of earlier rulings, it should be noted that such motions are not inherently frivolous and may even be encouraged to promote judicial economy and avoid unnecessary appeals. This court made this precise point in *Morton v. Wagner* where it stated:

"In enacting California Rules of Court, Rule 8.108(d), which allows an extension of time to file a notice of appeal where the appellant has filed a motion to reconsider pursuant to section 1008, the Legislature expressed favor for motions to reconsider. (*Safeco Insurance Company of Illinois v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477.) The reason is that motions to reconsider allow the trial court to consider new facts or law relevant to its order before resort to the appellate process. Here, appellant filed two such motions three years apart. One after each injunction issued by the trial court. While his motions did not raise the required jurisdictional grounds of new law or facts, no small number of these motions fail on the same grounds. Despite this common failing, these motions are still favored because when they are successful, they obviate the need for appellate review." (*Morton v. Wagner*, 156 Cal.App.4th at 826).

Respondents make numerous misstatements in their brief where they either misquote the record or fail to cite to the record at all. These include the following:

1. "Appellants have filed serial disqualification motions against every judge assigned to the case." Untrue and no citation to the record. For example, the Golins did not seek to disqualify any judge in Sacramento County. Respondents misidentify Judge Breen as a Sacramento County judge. He is from San Benito County. RB p. 13.
2. "In addition, because Appellants sued a sitting judge (Superior Court Judge and former County Counsel Jacqui Dong), the entire Santa Clara County bench recused itself from the proceedings." Untrue in its implication that Judge Dong was sued as a sitting judge. She was sued before she became a judge and based on allegations unrelated to the performance of any judicial duties. No citation to the record. RB p. 13.

3. “Due to the incessant delaying tactics⁷ of Appellants-which have included the referenced disqualification motions, numerous last minute in-court continuance requests, shuffling of Appellants’ counsel (resulting in more continuance requests), ex parte applications by Appellants, and other tactical ploys-Appellants succeeded in delaying a ruling on the defense motions for over five months.” Untrue and no citation to the record. RB pp. 13-14.
4. “Challenged as “biased” every judicial officer assigned to this case, resulting in numerous delays, reassignments, cancelled hearings, etc. (See pages 10 and 11, *supra*.)” Not true. Respondents cite their own written argument rather than evidence in the record. RB p. 16.
5. “Repeatedly forged their attorneys’ names on pleadings filed with the court.” Not true and not supported anywhere in the record nor at the

⁷ Here, Respondents are forgetting to note that the last round of motion practice was initiated by Stanford Hospital and Clinics, who demurred and moved to strike late in a voluminous brief, starting in August 22, 2007 (CT4269-4351), which required responses by Appellant (CT 4399-4439, 4477-4482) (Sept 10, 2007) and reply (CT 4465, Sept 14, 2007) requiring another month or so of briefing. Moving Respondent Palo Alto never did appear or file an answer or response even though timely served in Sacramento, until they were noticed of pending default in October 2007, upon which their first response was the instant motion to declare Appellants vexatious (CT 4592-, October 11, 2007).

The primary reason for delays was the Respondents’ persistent and groundless obstruction and evasion of Golin’s request for the appointment of a GAL, which was legally required before any demurrers could be heard involving Nancy’s claims, and the Golins’ objecting to having these demurrers prematurely heard or sustained on no-GAL grounds before the appointment of a GAL. Judge Breen pointed out that a “guardian ad litem was appointed but not named” (RT 35 lines 15-18), and also said he would see she would have one (RT 41 lines 22-25), thought that the County was in process of appointing one, but defendants took a fast detour around this question in Judge Breen’s next hearing (RT 57, lines 2-22; RT 59 lines 22-26) switching to claims that she did not need one because her rights would be preserved by passing over her claims and hearing them later (untrue), while the probate court staff did nothing and Mr. Golin informed the court he was told it was not instructed to find one (RT 64 lines 14-28).

pages respondents reference in their brief except where they cite their own argument as “evidence.” Respondents conceal from this court the evidence presented at the hearing which showed affirmatively that the signatures of counsel were not forged. Wallace and Beauvais both told the court that each of them had authorized Jeffrey to sign their names to pleadings. RT 161, lines 4-22, RT 162, lines 24-26. RB p. 16.

6. “The record here therefore more than amply supports the findings that Jeffrey Golin was self-represented and Mrs. Golin’s lawyers were mere puppets who willingly served as mere conduits of Mr. Golin’s abusive litigation tactics.” Untrue. The court made no finding that the attorneys were mere puppets or mere conduits. No citation to the record. RB 48.

The Golins request that these portions of respondents’ argument be deemed waived and stricken from the record. “It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations; if a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived”. *Duarte v. Chino Community Hospital*, (1999) 72 Cal.App.4th 849, 856, Cal. Rules of Court, rule 8.204(a)(1)(C).

C. THE TRIAL COURT ERRED WHEN IT DISMISSED NANCY GOLIN’S CLAIMS FINDING THEM NOT PROPERLY BEFORE THE COURT

Nancy Golin was not declared vexatious along with her parents, and her causes of action were not dismissed on those grounds. The trial court dismissed Nancy’s claims *sua sponte* without a motion before it, notice, or briefing of issues.

The trial court reasoned that dismissal of Nancy’s claims was compelled by

its earlier ruling finding Jeffrey and Elsie vexatious. RT 227, lines 11-16. Accordingly, Nancy's rights were forfeited by her parents' litigation conduct. In making this ruling, the court found that Nancy had plenty of remedies in the probate court and that this lawsuit was not the proper vehicle to adjudicate them. RT 227, lines 3-10.

Respondents maintain their position on appeal that Nancy was never before the court because her parents did not have standing to file on her behalf. The Golins produced ample statutory and case authority to the contrary, all of which the respondents ignore in the brief. See AOB, pp. 35-37. Respondents cite one case for the proposition that only an aggrieved party has standing to appeal and other cases that hold that an attorney has no authority to appeal without the consent of the client. None of them are apposite here because Nancy is an aggrieved party having suffered dismissal of her claims and is unable to personally consent because she is incapacitated. Respondents ignore the Golins' claim that Elsie remains Nancy's GAL notwithstanding respondents' persistent efforts to thwart every proposed candidate to fulfill that role.

The trial judge's rulings are not entitled to any deference on appeal because these are purely legal issues subject to *de novo* review.

6. Golins Have Constitutional Standing As “Beneficially Interested” Parties In Their Own Right To Bring Claims on Nancy’s Behalf

Quoting a recent California Appellate decision last July, *County of San Diego*

v. *San Diego NORML* (2008) 165 Cal.App.4th 798, 814:

“As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication *because he or she has either suffered or is about to suffer an injury of sufficient magnitude* reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. To have standing, a party must be beneficially interested in the controversy; that is, he or she must have ‘some special interest to be served or some particular right to be preserved or protected *over and above the interest held in common with the public at large.*’ [Quoting *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical.” (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315, italics added.)

There can be essentially no dispute that the Golins and their daughter, Nancy, amply meet this simple test, based on the horrendous allegations pleaded in their extensive and detailed Verified Amended Complaint (VAC). Furthermore, the Golins have an obvious beneficial interest in the vindicating the rights, welfare and safety of their disabled only-daughter whom they have cared for and protected essentially all her life, and in vindicating the deprivations of her civil rights, which she cannot do on her own behalf. Beneficial interest means a *personal interest in the outcome.* (*Municipal Court v. Superior Court* (1988) 202 Cal.App.3d 957, 962-963.) (quoting *Tracfone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1364.)

In response, respondents now assert with breathtaking audacity and without reference to any authority that, as a conserved individual, Nancy has no right to ac-

cess to the courts without their permission. RB 51. Once again, respondents fail to provide this court with reasons why the trial court's judgment should be upheld.⁸

Respondents state that "Nancy is a conserved individual and that the conservator has not authorized the filing of a suit on her behalf or retained counsel for her". RB p. 51. They assert that "[i]n this case, neither Nancy nor her conservator have given consent to this Appeal and as a result this Court should dismiss the appeal as to Nancy and these grounds." RB, p. 52. And Nancy did not consent to the filing of this appeal on her behalf either.

Respondents brush off *her family*, denying them any "aggrieved party" or "interested party" standing whatever: "Unless or until the Probate Court appoints such individual to act on Nancy's behalf, however, only her conservator can decide whether to undertake litigation on her behalf." RB, p. 51.

The Respondents proposed something like this scheme before, when the idea of a guardian ad litem was being discussed before Judge Hyman. Mr. Press, repre-

⁸ It is the duty of a respondent who has secured a meritorious judgment to assist the court on appeal by pointing out the reasons why the action of the lower court should be sustained. *Mosher v. Johnson* (1921) 51 Cal.App. 114, 116. [It is as much the duty of the respondent to assist the court upon the appeal as it is to properly present a case, in the first instance, in the court below.] When issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by reviewing court is unnecessary. *Landry v. Berryessa Union School Dist.*, (1995) 39 Cal.App.4th 691, 699.

senting the Attorney Generals Office, said (RT 5/30/07):

(MR. PRESS:)

4...some sort of

5independent guardian ad litem who would look at these far

6more dispassionately, I think, would probably serve

7everyone.

[...except the family, of course. They have “too much” interest.]

Ms. Fligor, representing the County, said that some “‘objective’ third party” or stranger should be appointed, because “we don’t have Nancy here to tell us if she really wants to press these claims.” This approach precludes any “*interested party*” from taking up Nancy’s cause – how convenient for the defendants! She supported the delegation of judicial fact finding to the GAL⁹ (RT 14, lines 20-22):

20 We are objecting to that, Your Honor. It’s

21 our position, Your Honor, that the guardian ad litem first has to

22 determine whether or not Nancy’s rights have been violated.

And suggesting an “‘independent’ investigation of the claims before they could be viewed by the court fact finder (RT 15, lines 2-6)

This was echoed by Mr. Gale, for SARC (RT 19, line1). Certainly it makes

⁹ With the delegation of judicial fact-finding function to an evaluator or guardian ad litem, the parties are “effectively foreclosed access” to the court, or to the defendant DDS itself that would present a *prima facie* executive-judicial California constitutional separation of powers violation (Cal. Const. Art. III, §3).

sense from the state's standpoint as a defendant to minimize any interests in Nancy of any party that represents her against them, just as Ms. Street did in the probate trial.

Ms. Bickel, representing Talla House, chimed in with the idea that an "independent, neutral third party be appointed to look at Nancy's claims." (RT 19, lines 10-14)

(MS. BICKEL):

8 We just believe that a neutral third party does need
9 to come in, look at the claims, make sure that they are in
10 the best interests of Nancy. And if they are, that's fine.
11 Proceed forward. But if they're not, they need to be
12 dismissed.

On that basis, Judge Hyman apparently held that anyone that had ever laid eyes on the Golins was not a neutral party, ruling that Mr. Lehman was also allegedly conflicted, based on a fraudulent misrepresentation in open court by Mr. Gale concerning a declaration made by Mr. Lehman. Judge Hyman held that "an independent guardian ad litem is necessary." But then everything went into backpedal mode after that. Defendants are gaming the system with tactics to thwart anyone from acting as Nancy's GAL while pushing hard for an early hearing on demurrers, in which they argued that Nancy's claims must be dismissed because she lacked a GAL. At the same time, respondents point to evidence that the Golins numerous attempts to get a GAL appointed is evidence of their vexatiousness. The Golins were even unsuccessful in getting the court to appoint independent GALs who did

not even know the Golins. RT 215, lines 18-28 through 218, line 2; RT 226, lines 24-28 through RT 227, line 2.

Respondents persistently argue that Nancy cannot sue respondents without their permission. Respondents blithely ignore the fact that the conservator has an *inherent conflict of interest* in avoiding litigation and can never be expected to appoint a *guardian ad litem* to sue himself.

Nancy deserves something more than an “uninterested” party, someone that is not interested in her. California through its vendor SARC objects to anyone that is supposedly “controlled by the Golins” to be appointed as Guardian ad Litem. Merely cooperating with the parents is grounds for the GAL’s dismissal, as they respondents see it. But plaintiffs in a lawsuit normally have to cooperate, have to be familiar with the issues and facts.¹⁰

In *Whitmore v. Arkansas*, 489 U.S. 1073 (1989), a three pronged test was enunciated to qualify a third-party advocate: 1) there should be some reason why the person himself is unable to act on his own behalf, 2) must be truly dedicated to the interests of the party he intends to represent, and 3) *have some significant relation-*

¹⁰ An incompetent person or minor technically sues by next friend and defends by *guardian ad litem*, but the terms are normally used interchangeably.

*ship with that party.*¹¹ This test has been repeatedly affirmed and is now well settled in law. What respondents suggest flies directly in the face of *Whitmore*. Thus to impose some third party with no previous relationship to the proposed ward or knowledge of the case runs contrary to *Whitmore*. The so-called independent third party may in fact actually be a puppet of these powerful and entrenched state defendants, appointed by a non-impartial court, and would violate this rule assuring plaintiff Nancy Golin the services of a zealous advocate. What is not required here is independence, but adversarial advocacy; that is our system of justice.

7. Developmentally Disabled Persons Have Fundamental Constitutionally Guaranteed Access to Courts

If juveniles (*In re Winship*, 397 U.S. 358 (1970), *Application of Gault*, 387 U.S. 1 (1967)), mental patients (*Ward v. Kort*, 762 F.2d 856 (1985)) and prisoners

¹¹ “These limitations on the ‘next friend’ doctrine are driven by the recognition that ‘[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.’” *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (1921); see also *Rosenberg v. United States*, 346 U.S. 273, 291-292 (1953) (Jackson, J., concurring with five other Justices) (discountenancing practice of granting “next friend” standing to one who was a stranger to the detained persons and their case and whose intervention was unauthorized by the prisoners' counsel). “Indeed, if there were no restriction on ‘next friend’ standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of ‘next friend.’” (*Whitmore* at 1728)

(*Bounds v. Smith*, 430 U.S. 817 (1977)¹²)¹³ may have fundamental constitutionally guaranteed access to state courts under the First and Fourteenth Amendments,¹⁴ then why not innocent developmentally disabled conservatees like Nancy? The answer is that they do.

The rights of developmentally disabled persons are guaranteed under both state (Cal. W&I Code §4602, Cal W&I Code §4503) and federal law (42 U.S.C.

¹² “It is now established beyond doubt that prisoners have a constitutional right of access to the courts. This Court recognized that right more than 35 years ago when it struck down a regulation prohibiting state prisoners from filing petitions for habeas corpus unless they were found “ ‘properly drawn’ ” by the “ ‘legal investigator’ ” for the parole board. *Ex parte Hull*, 312 U.S. 546 (1941). We held this violated the principle that “the state and its officers may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus.” *Id.*, at 549, 61 S.Ct. at 641. See also *Cochran v. Kansas*, 316 U.S. 255 (1942).”

¹³ Denial of prisoners’ access to the courts is actionable under the civil rights act, (*Hatfield v. Bailleaux*, 290 F.2d 632 (1961), *Stiltner v. Ray*, 322 F.2d 314 (1963)). An interested party has standing to advocate for a developmentally disabled person’s right of habeas corpus for release from a state institution (*In re Hop*, 29 Cal.3d 82 (1981).)

¹⁴ Outside the prisoner context, the Court has found support for the right of access in the Privileges and Immunities Clause of Article IV, *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 147 (1907); see also *Smith v. Maschner*, 899 F.2d 940, 947 (1990), as well as in due process of law, *Boddie v. Connecticut*, 401 U.S. 371 (1971). The Supreme Court has also held, "The right of access to the courts is but one aspect of the right of petition [of the First Amendment]." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court tied this First Amendment right of access to the prisoner context. The Court stated, "Like others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts." *Id.* at 523, 104 S.Ct. at 3198 (cit-

(footnote continued-→)

§15009¹⁵). The right to access to courts is not one of these expressly enumerated rights, but is more fundamental, and is guaranteed in applicable general language (Cal. W&I Code §4502: “Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California”; 42 U.S.C. 15009(b): “Clarification: The rights of individuals with developmental disabilities described in findings made in this section shall be considered to be in addition to any constitutional or other rights otherwise afforded to all individuals.”)

The Lanterman Act (Cal. W&I Code 4500 et seq) prescribes a set of conditions (Cal W&I Code §4504) under which *some* of the rights enumerated in Cal W&I Code §4503 (only subsections a-e) may be judicially denied but only for good cause in the person’s own alleged best interests. Denial of these rights is governed by state administrative regulations with strict due process guidelines (17 CCR §50530, Cal. Admin. Code tit. 17, § 50530), and at no time has any agent of DDS attempted to limit Nancy’s rights by resort to administrative procedures. More importantly, none of these five deniable rights involve curtailing access to the courts. Denying Nancy an independent and zealous guardian ad litem is indistinguishable

ing *Johnson v. Avery* 393 US 483 (1969).

¹⁵ Developmentally Disabled Assistance and Bill of Rights Act (current 42 U.S.C. §15001 *et seq*) provides private rights of action under §1983 for violations *Norton*

(footnote continued-→)

from effectively denying access to the courts.

Even if Nancy's rights were removed completely by virtue of her being a conserved person, Nancy was not a conserved person when she was kidnapped by the state in November 2001. Violations of an unconserved person's Fourth Amendment rights may not be retroactively pardoned eleven months later by virtue of having later been conserved. This is analogous to a suspect losing his cause of action for false arrest after being kidnapped into state custody without a warrant, emergency or probable cause, because he was ultimately convicted. The law does not work like that.

"Cause of action for false arrest accrues on arrest and is actionable immediately; contrary to law of malicious prosecution, there is no requirement that arrestee allege favorable termination of the criminal proceeding."
Mohlmann v. City of Burbank (1986) 179 Cal.App.3d 1037.

DDS's attempted arrogation of power over the developmentally disabled seems unfettered by any limiting principle and this leads to the disturbing question: Who protects a dependent adult from that leads to some disturbing consequences. How far could a conservator legally go? How much harm could her conservator do to her over what period of time without any oversight, transparency or relief? Is no one to be held legally responsible for injuring her, or kidnapping her, wrongly imprisoning her, discriminating against her, violating her human rights, or drugging

v. Bevilacqua, 458 F.Supp. 610 (1978).

her into critical condition? Should this rule apply to actions taken before Nancy *was* a conserved person, too? Is that really merely within the jurisdiction of probate court, to punish her abusers? Could her conservator, say, *torture or euthanize* her, without any legal problems? Obviously that would be absurd. Wouldn't she be entitled to damages for her injuries and privations like anyone else?

8. Golins Have Statutory Standing To Bring Suit On Nancy's Behalf

In addition, Palo Alto totally refuses to respond to the Golins AOB argument that they *do* have standing to file suit on Nancy's behalf as "interested person"¹⁶ under the auspices of Chapter 11 of Part 3 of the Welfare and Institutions Code, 1992

¹⁶ This Act provides all the necessary authority for the Golins to file civil suit on behalf of their daughter, which they have done under Count 17 (VAC ¶368, CT 366-367) Cal W&I §15657.3(d) states in relevant part: "...*(2) If the personal representative refuses to commence or maintain an action...*the persons described in subparagraph[] ... (C) of paragraph (1) *shall have standing to commence or maintain an action for [dependent adult] abuse...*" Cal. W&I §15657.3(d)(1)(C) refers the definition of "interested person" to Cal. Prob. Code §48, which includes Subsection (a)(2) "Any person having priority for appointment as personal representative", which in turn is defined by Cal. Prob. Code §1812, which includes Subsection (b) "(3)A parent of the proposed conservatee, or the person nominated by the parent pursuant to Section 1811." This would give standing not only to the Golins, but to a person nominated by them. "Determining whether party is within general definition of "interested person" with standing to take part in probate proceeding requires evaluation of underlying policy considerations regarding specific probate proceeding and determination of whether party is sufficiently interested to intervene." *Estate of Maniscalco* (1992) 9 Cal.App.4th 520. "Party may qualify as "interested person" entitled to participate for purposes of one probate proceeding but not for purposes of another." *Estate of Davis* (1990) Cal.App.3d 663, *review denied*.

Elder Abuse and Dependent Adult Civil Protection Act., Cal. W&I Code §15600 et seq. CT 366-367, or as “parties aggrieved” under the enforcement provisions of the Americans with Disabilities Act codified, under 42 U.S.C. § 12133 as claimed on the record (citation). Palo Alto has scrupulously avoided addressing this very relevant argument here.

V. CONCLUSION

For the foregoing reasons, appellants respectfully request that the judgment of dismissal be reversed and that the case be transferred to a complex litigation department of the Alameda or San Francisco Superior Courts.

DATED: February 4, 2009

DAVID J. BEAUVAIS
Attorney for Appellants

CERTIFICATE OF WORD COUNT

Appellants certify that this brief excluding the table of contents and table of authorities consists of 8,124 words.