SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 2, Honorable Drew C. Takaichi, Presiding
Audrey Nakamoto, Courtroom Clerk

191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

PROBATE LAW AND MOTION TENTATIVE RULINGS
DATE: September 11, 2024 TIME: 10:00 A.M.

NOTICE

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23PR194132	*The Estate of Weiwei Hsieh*	Click or scroll to line 1 for tentative ruling.
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Case Name: *The Estate of Weiwei Hsieh*
Case No.: 23PR194132
Hearing date, time, and department: July 11, 2024 at 10:00 a.m. in Department 2

INTRODUCTION

Petitioner Andrey Jivsov ("Petitioner") initiated this case by filing a petition to probate a purported will of Decedent's. According to that petition, Petitioner is the father of Decedent Weiwei Hsieh's ("Decedent") daughter Fiona. Respondent HW Spencer Hsieh ("Respondent"), Decedent's former husband, filed a petition to, inter alia, revoke the probate of the will submitted by Petitioner. Respondent's petition also asserted several claims naming Petitioner as a respondent.

On August 4, 2023, the court issued an order appointing attorney Matthew A. Crosby, Esq. ("Crosby") as guardian ad litem for Respondent on an ex parte basis.

On August 7, 2023, Respondent filed a petition for revocation of probate of will, to suspend and remove Petitioner as executor of Decedent's estate and trustee of her trust, to determine interference with expected inheritance, and alleging claims for return of estate property, wrongful taking of estate property, conversion, elder abuse, fraud, misappropriation of estate property, breach of fiduciary duty, and constructive trust.

Currently before the court is Petitioner's motion to remove Crosby as guardian ad litem for Respondent. Respondent initially opposed the motion only on procedural grounds. The court ordered Respondent to provide a substantive opposition to the motion, which the court has received. The motion initially came on for hearing on February 23, 2024. The court continued the hearing multiple times over Petitioner's objection so that it could be heard by Judge Takaichi as the motion appeared to be seeking reconsideration of an order appointing the guardian ad litem signed by this court. Respondent filed multiple unauthorized replies, including one filed on July 2, 2024[1] and other documents challenging that opposition.

DISCUSSION

I. Requests for Judicial Notice

On January 8, 2024, Petitioner filed a request for judicial notice in connection with the initial motion to remove guardian ad litem. The court will grant the unopposed requests for judicial notice of the existence of the court documents in requests 1, 2, 4, and 6 through 12 pursuant to Evidence Code section 452, subdivision (d), with the caveat that it will not take judicial notice of the truth of hearsay statements contained therein. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) The court declines to take judicial notice of item 5 as Petitioner has provided no legal basis for the court to take

[1] The court declines to consider the reply filed on July 2, 2024. (See *Guimei v. General Electric Co.* (2009) 172 Cal.App.4th 689, 703 [determination of whether to consider unauthorized filings is within the discretion of the court].) Petitioner is admonished that the court may refuse to consider unauthorized filings in the future.

judicial notice of such an item. With respect to item 3, the court declines to take judicial notice of the unauthenticated video, which has not been provided to the court.[2] Further, as mentioned above, the court may not take judicial notice of the hearsay content of court documents. Thus, the fact that Petitioner has attached a transcript of the video does not change the outcome of this request.

Petitioner also filed requests for judicial notice on February 21, 2024 and March 13, 2024. The court declines to take judicial notice of these items as it appears that Petitioner requested judicial notice in order to show that Respondent filed his initial non-substantive opposition late. As the court has already continued the hearing in order to allow Respondent to provide a substantive opposition, this issue is moot.

Petitioner's requests for judicial notice, filed on April 11, 2024 with his reply to Respondent's substantive opposition are denied because they fail to comply with Rules of Court, rule 3.1113(l) and the items are irrelevant to the issue before the court, namely, whether to remove the guardian ad litem. (See *People ex rel. Lockyer v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2 [only relevant matters are subject to judicial notice].)

II. Merits of the Motion

Petitioner contends that the guardian ad litem should be removed because (1) the court should not have appointed a guardian ad litem in the first place because Respondent's showing in support of the ex parte application was insufficient, (2) a guardian ad litem is unnecessary, and (3) the appointment of the guardian ad litem means that Respondent will not be able to testify at trial in this matter, and (4) the guardian's fees could be paid out of Decedent's estate or trust.

With respect to Petitioner's first argument, it appears to be correct that the ex parte application was filed on an improper form as it requested a guardian pursuant to Code of Civil Procedure section 372, subdivision (a)(4)(B).[3] The form also indicates that it is not to be used in probate actions.

Section 372, subdivision (a)(2)(A) provides, "A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to appoint a guardian ad litem to represent the … person who lacks legal capacity to make decisions . . . . " "Where reference is made in this chapter to 'a person who lacks legal capacity to make decisions,' the reference shall be deemed to include all of the following: [¶] (B) A person who lacks capacity to assist the person's attorney in the preparation of the case." (§ 372, subd. (a)(4)(B).) Section 373, subdivision (c) provides that the court may appoint a guardian ad litem on its own motion. " 'The general provisions for appointment of a guardian ad litem' under Code of Civil Procedure section 372, however, 'do not apply in probate proceedings. Instead, the matter is governed by [Probate Code section] 1003.' [Citation.]" (*Chui v. Chui* (2022) 75 Cal.App.5th 873, 898, fn. 28.)

[2] The court notes that Petitioner provided a link to the video but the link does not work.

[3] All further undesignated statutory references are to the Code of Civil Procedure.

Nonetheless, it is clear that there is a provision for appointment of a guardian ad litem in a probate case under the circumstances presented in this case. "The court may, on its own motion or on request of a personal representative, guardian, conservator, trustee, or other interested person, appoint a guardian ad litem at any stage of a proceeding under this code to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate . . . A person who lacks legal capacity to make decisions." (Prob. Code, § 1003, subd. (a)(2).) "The word 'may' implies discretionary decisionmaking authority [citation], and, as the statutory text indicates, such discretion is to be guided by the court's determination regarding the adequacy of the representation of the [ward's] interest in the absence of a guardian ad litem." (*Chui v. Chui, supra,* 75 Cal.App.5th at pp. 897-898.)

The mere failure to file the ex parte application on the appropriate form is insufficient to cause the court to reconsider appointing the guardian ad litem as the court may appoint a guardian ad litem on its own motion. (Prob. Code, § 1003, subd. (a).) Petitioner contends that Respondent may not "self-apply" for a guardian ad litem. But, he cites only section 373, which does not apply in probate proceedings. Pursuant to Probate Code section 1003, subdivision (a), any interested person may apply for a guardian. And, again, the court may appoint a guardian ad litem on its own motion. Thus, even if Respondent improperly requested his own guardian ad litem, the court will overlook this irregularity.

Petitioner further asserts that Respondent was not a party to the proceedings at the time of the ex parte application for appointment of the guardian ad litem. But, Probate Code section 1003 does not require that the person for whom the guardian is appointed be a party to the case. In fact, a guardian ad litem may even be appointed for a beneficiary who is not yet born. (Prob. Code, § 1003, subd. (a)(3).) It is enough that the potential ward have an interest in the case. (See Prob. Code, § 1003, subd. (a) [court may appoint guardian ad litem to protect the interest of specified persons including unborn beneficiaries and persons whose identities are unknown].) Here, Respondent contends that Decedent drafted a trust that names him as a beneficiary. Nothing in Probate Code section 1003 requires Respondent to prove the validity of his claim to a portion of Decedent's property prior to being appointed a guardian ad litem.

Petitioner also argues that Respondent only requested the appointment of a guardian ad litem in an attempt to circumvent the statute of limitations under Probate Code section 8270 for filing Respondent's petition. But, Respondent's petition does not indicate that the appointment of a guardian ad litem circumvents the statute of limitations. In fact, Respondent contends he was not served with the notice of his petition for probate. Thus, it does not appear that Respondent intends to use the appointment of the guardian ad litem to somehow circumvent the statute of limitations.[4]

Petitioner also contends that Respondent is not in need of a guardian ad litem because he is in good health and he has been able to represent himself in other court proceedings involving the parties. Petitioner points to "complex" documents Respondent filed in other court proceedings. However, Respondent is 97 years old and it would stand to reason that his condition could change at any time. The court acknowledges Petitioner's evidence showing that Respondent has been able to file complex filings with the court. But, even though

[4] The court takes no position on whether Respondent's petition was filed within the applicable statute of limitations period as this is outside the scope of this motion to remove the guardian ad litem.

Respondent filed the documents, he may not have drafted them himself. Further, the fact that he may have been able to do so at one time, even relatively recently, does not mean that he is still able to perform such a task at this time.

It was initially represented to the court via the ex parte application that Respondent lacked capacity to assist his attorney in preparing the case. In connection with the opposition to the motion to remove guardian ad litem, Respondent's guardian ad litem, Mr. Crosby, has provided a declaration indicating why he believes a guardian is necessary. Crosby declares that he met with Respondent and Respondent's attorney because counsel represented to him that he was having difficulty communicating with Respondent and having Respondent assist counsel with the case. (Declaration of Matthew A. Crosby at ¶ 10.) Crosby also states that Respondent suffers from extreme hearing loss and is having difficulty remembering certain things. Respondent repeatedly told Crosby that he is not himself recently. (Id. at ¶¶ 12-13.) Crosby concludes, "My observations regarding Spencer's difficulties and limitations support my conclusion that he is 'a person who lacks legal capacity to make decisions' of the nature and quality required to assist Mr. Rogers [Respondent's counsel] in the preparation of [Respondent] Spencer's case." (Id. at ¶ 15.)

Petitioner asserts that there is no medical evidence establishing that Respondent lacks legal capacity to make decisions but he points to no authority indicating that such evidence is required. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [points asserted without authority for the proposition advanced are without foundation and require no discussion].)[5] In fact, the case law appears to be to the contrary. (See *Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 12 [provisions for appointment of guardian ad litem "do not require any prior independent adjudication of incompetency. [Citation.] Incompetency may exist independently of any judicial determination thereof. [Citation.]"].)

With respect to the issue of Respondent's potential testimony, Petitioner provides no authority indicating that the appointment of a guardian ad litem means that the ward will be unable to testify. "Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter." (Evid. Code, § 700.) "A person is disqualified to be a witness if he or she is: (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through

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[5] Notably, Petitioner cites *In re R. S.* (1985) 167 Cal.App.3d 946 and In re C. G. (2005) 129 Cal.App.4th 27, which was partially disapproved in *In re James F.* (2008) 42 Cal.4th 901, 919, fn. 2. Neither of these decisions indicate that any form of medical evidence is required to support the appointment of a guardian ad litem. Both cases are distinguishable. In *In re R. S., supra*, 167 Cal.App.3d 946, the Court of Appeal held that the trial court did not err in failing to appoint a guardian ad litem for a litigant in a juvenile dependency case in the absence of any request for appointment of a guardian ad litem and where counsel for the litigant represented to the court that the litigant understood the court proceedings. (*Id.* at pp. 978-980.) In *In re C. G., supra*, 129 Cal.App.4th 27, the Court of Appeal concluded that the trial court erred in failing to explain to the litigant, who did not consent to the appointment of the guardian ad litem, the purpose of the appointment, the authority of the guardian, or the reason why her attorney sought appointment of the guardian. (*Id.* at p. 33.) The court further found that the trial court erred because did not inquire into the litigant's competency where the only evidence before the court was a report indicating that the litigant suffered from cerebral palsy. (*Ibid.*) The thrust of the court's reasoning was that these errors violated the litigant's due process rights. (*Id.* at p. 32 [court considered only the issue of whether the litigant's due process rights were violated].) Here, Respondent consents to the appointment of the guardian ad litem, the guardian ad litem was requested, and counsel for Respondent and the guardian assert that Respondent is unable to assist in the instant legal proceedings.

interpretation by one who can understand him; or (2) Incapable of understanding the duty of a witness to tell the truth." (Evid. Code, § 701, subd. (a), formatting omitted.)

With respect to the issue of payment of the guardian's fees, Probate Code section 1003, subdivision (c) provides, "The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of the property of the estate involved or by the petitioner or from any other source as the court orders." Here, the guardian has not asked that fees be paid out of the estate funds and the court has made no determination as to payment of the fees. Accordingly, Petitioner's contention that the fees could be made payable out of the estate or trust is mere speculation at this point and it does not provide any basis to remove the guardian ad litem.

The removal of a guardian ad litem is within the sound discretion of the trial court. (*Estate of Emery* (1962) 199 Cal.App.2d 22, 26.) The court declines to remove the guardian ad litem in this case. The motion is DENIED.[6]

CONCLUSION

The motion to remove guardian ad litem is DENIED.

[6] In light of this conclusion, the court does not reach Respondent's argument regarding Petitioner's standing to bring this motion.

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