Third-Party Standing as an ADA Accommodation on Appeal

By Thomas F. Coleman
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As a preliminary matter, sometimes an appellate court must resolve an issue of "standing" before it ever reaches the merits of an appeal. Standing to appeal is different than standing to participate as a litigant at the trial court level.

This difference was illustrated in the gay marriage case challenging the constitutionality of Proposition 8 – the initiative that prohibited the State of California from issuing marriage licenses to same-sex couples. Several couples filed a lawsuit in federal court to challenge the constitutionality of Prop 8. When the state declined to defend the initiative, the court allowed the proponents of the ballot measure to intervene to defend its legality.

After the trial court declared Proposition 8 unconstitutional, the proponents appealed. When the case eventually reached the U.S. Supreme Court, the justices ruled that the proponents lacked standing to appeal. The court explained that to have standing to appeal, a litigant must show personal and tangible harm to his or her rights. Yes, the proponents may have been offended by the ruling of the trial court, but the court had not ordered them to do or refrain from doing anything. A generalized grievance is not sufficient to confer appellate standing in the federal court system. (Hollingsworth v. Perry, 133 S.Ct. 2652 (2013).

California also has strict rules on appellate standing. (Conservatorship of Gregory D., 214 Cal.App.4th 62 (2013). The case of Gregory D. involved a limited conservatorship proceeding in which a trial court entered an order restricting the constitutional rights of a young man with autism. Both parents were also parties to the proceeding in the trial court.

Although Gregory was an adult and had repeatedly objected to being forced to visit with his father, Gregory's court-appointed attorney did not advocate on behalf of his client's stated wishes. Instead, the attorney submitted the matter to the court without presenting evidence or legal arguments in defense of Gregory's freedom of association. When the trial court ordered Gregory to visit his father despite Gregory's objections, the attorney essentially surrendered his client's rights. The attorney did not object or file an appeal.

Gregory's mother filed an appeal to vindicate her son's constitutional rights of liberty and privacy. No matter how unconstitutional the order forcing Gregory to visit his father may have been, the Court of Appeal did not reach the merits of the appeal. Instead, it declared as a preliminary matter that Gregory's mother lacked standing to appeal.

The court said the judge's order did not affect the mother. It only implicated Gregory's rights. Relying on Code of Civil Procedure Section 902, the court affirmed the judgment below. The statute declares that "any party aggrieved" by a judgement may appeal. The Court of Appeal ruled that a party may not assert error that injuriously affected only non-appealing co-parties.

Her status "as Gregory's concerned mother does not confer standing to appeal on his behalf," Presiding Justice Joan Dempsey Klein wrote for the court. Because she is not "personally aggrieved by said order," the mother "lacks standing to assert error on Gregory's behalf."

At first glance, the court's opinion in Gregory D. seems like a garden variety application of the normal rules of appellate standing. However, just beneath the veneer of normalcy lurk potential violations of federal law.

The appellate court assumed that, just because his court-appointed attorney chose not to object or appeal from the potentially unconstitutional order, that Gregory did not feel aggrieved by being forced to associate with his father. In reality, however, Gregory was not a party to the appeal because his attorney decided to surrender his rights in the trial court.

Because of the nature of the trial court proceeding – a limited conservatorship – the appellate court knew that Gregory had a developmental disability that affected his ability to make decisions. This knowledge triggered a duty for the court, under the Americans with Disabilities Act, to inquire further as to whether to provide Gregory with an accommodation so that he would have access to justice in the appeal. The court should have appointed an attorney to represent him in the appellate proceeding so that, through the attorney, Gregory's position on the issue of standing or on the merits could have been presented.

An appointed appellate attorney could have argued that Title II of the ADA may require the modification of normal procedural rules in order to give a litigant with a developmental disability access to justice on appeal. Even without appointing an appellate attorney to represent Gregory, the court should have recognized its obligations as a public entity to sometimes modify normal rules, on its own motion, to ensure that a litigant with a disability has meaningful participation in an appeal.

Because there are never any appeals by people with disabilities in limited conservatorship proceedings, appellate judges have probably not given any thought to their obligations under Title II of the ADA in such cases. Without any appellate oversight, judicial errors and abuses of discretion are allowed to exist and may be repeated indefinitely.

The published opinion of Gregory D. is binding law statewide. Unfortunately, the opinion failed to recognize that cognitively-disabled litigants cannot appeal on their own. When their rights are violated by a trial court and their appointed attorney is indifferent or surrenders their rights, their only hope for redress is by allowing a third party to have appellate standing. A concerned parent who is a party to the case in the trial court would be a logical advocacy surrogate on appeal.

The opinion in Gregory D. is an ADA violation in need of a remedy. Because the case is final, it is too late to secure an individualized remedy for Gregory. But it is not too late for state officials to craft a general remedy for limited conservatees in future appeals.

Several remedial actions can be taken by the Supreme Court, Judicial Council, and Legislature to modify normal rules of appellate standing so that litigants with cognitive and communication disabilities receive access to appellate justice.

The Supreme Court has authority, on its own motion, to order a published appellate opinion to be de-published at any time. See California Rules of Court, Rule 979(d). An order de-publishing the opinion in Gregory D. would help eliminate any misimpression that third-party standing is not available in an appeal involving a conservatee.

The Judicial Council could adopt a rule allowing a third-party to have standing to protect the constitutional rights of litigants with cognitive disabilities. Such a rule would implicitly incorporate the requirements of the ADA into state appellate procedure.

If the judicial branch fails to take these actions, the Legislature could enact "Gregory's Law" amending Code of Civil Procedure Section 902 so that third-party appellate standing is clearly available to assert the rights of cognitively-disabled litigants.

In any event, whether or not these actions are taken, there is nothing to prevent appellate court judges from applying the requirements of the ADA to cases that come before them now.◊◊◊

http://spectruminstitute.org/ada-standing.pdf

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