

EMERGENCY STAY REQUESTED

**IN THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

**JEFFREY R. GOLIN, ELSIE Y. GOLIN,
NANCY K. GOLIN**

Plaintiff-Petitioners,

v.

**SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF SAN-
TA CLARA,**

Respondents

**CLIFFORD B. ALLENBY, THERESA DEL-
GADILLO, H. DEAN STILES, S. KIMBERLY
BELSHÉ, ARNOLD SCHWARZENEGGER,
COUNTY OF SANTA CLARA, and SANTA
CLARA COUNTY BOARD OF SUPERVISORS,
JAMIE BUCKMASTER, MARY GREEN-
WOOD, MALORIE M. STREET, JACQUI
DUONG, RANDY HEY, SAN ANDREAS RE-
GIONAL CENTER, INC., SANTI J. ROGERS,
MIMI KINDERLEHRER, TUCKER LISKE,
LISA WENDT, R.N., NANCY J. JOHNSON,
CITY OF PALO ALTO, LORI KRATZER,
EDNA MANTILLA, dba EMBEE MANOR,
ROSELILY TALLA, ANSELMO TALLA, dba
TALLA HOUSE, STANFORD HOSPITAL, INC.,
GEORGIANNA LAMB, MARVIN P. MASADA,
M.D., and DOES, 1-50,**

Defendants-Real Parties in Interest,

**Court of Appeal Case No.:
Superior Court Case No.: 1-07-cv-082823**

**VERIFIED PETITION FOR WRIT
OF MANDATE TO DISQUALIFY
JUDGE UNDER CCP 170.1 CHAL-
LENGE (CCP §1085, 170.3(6)(d)),
AND STAY**

EMERGENCY STAY REQUESTED

Stay of September 21, 2007 proceedings
deciding various demurrer motions and
motions to strike

**Superior Court Assigned Judge:
Hon. Thomas P. Breen**

**VERIFIED PETITION FOR WRIT OF MANDATE
FOR CCP §170.1 CHALLENGE AND STAY**

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plaintiff-petitioner in propria personam

TABLE OF CONTENTS

TABLE OF CONTENTS.....i
TABLE OF AUTHORITIES.....ii
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS.....1
IN THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT.....4
PROCEDURAL SUMMARY.....5
NECESSITY FOR STAY8
RELIEF REQUESTED.....9
VERIFICATION OF PETITIONER JEFFREY R. GOLIN.....10
STATEMENT OF THE CASE.....11
LEGAL ARGUMENT.....13
I. CCP §170.1 CHALLENGES FOR CAUSE ARE NEVER “UNTIMELY” IF AS
HERE THEY ARE PRESENTED AT THE EARLIEST PRACTICABLE OP-
PORTUNITY AFTER DISCOVERY OF THE FACTS CONSTITUTING THE
GROUNDS FOR DISQUALIFICATION, WHETHER THE JUDGE HAS AL-
READY MADE RULINGS OR NOT.....13
II. REGARDLESS OF TIMING, JUDGE BREEN HAD A GREATER DUTY TO
DISCLOSE HIS CONFLICT OF INTEREST WITHOUT BEING CHAL-
LENGED.....14
III. JUDGE BREEN MAY NOT PROCEED BY IGNORING THE CHALLENGE
WITHING FILING AN ANSWER AND FORCE THE PARTIES TO PRO-
CEED NOTWITHSTANDING A CONCEDED CONFLICT OF INTEREST.. 15
IV. JUDGE BREEN WAS ALREADY DISQUALIFIED BEFORE HE COM-
MENCED TO PRESIDE OVER THE ACTION.....15
V. JUDGE BREEN’S RULINGS ARE VOID OR VOIDABLE.....15
CONCLUSION16
CERTIFICATION OF WORD COUNT.....i
TABLE OF EXHIBITS.....i
PROOF OF SERVICE.....iii
SERVICE LIST, 9/20/07.....iv

TABLE OF AUTHORITIES

CASES

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986).....8

Alhusainy v. Superior Court,
(2006) 143 Cal.App.4th 385, 48 Cal.Rptr.3d 914.....7, 13

Christie v. City of El Centro
(App. 4 Dist. 2006) 37 Cal.Rptr.3d 718, 135 Cal.App.4th 767.....15, 16

Giometti v. Etienne
(1934) 219 Cal. 687, 688-689, 28 P.2d 913.....16

Urias v. Harris Farms, Inc.,
(1991) 234 Cal.App.3d 415, 285 Cal.Rptr. 659.....16

Liljeberg v. Health Services Acquisition Corp.
108 S.Ct. 2194 (1988).....8

Medix Ambulance Service, Inc. v. Superior Court,
(2002) 118 Cal.Rptr.2d 249.....8

North Beverly Park Homeowners Ass'n v. Bisno
(App. 2 Dist. 2007) 54 Cal.Rptr.3d 644, 147 Cal.App.4th 762.....13

Roscco Holdings Inc. v. Bank of America
(App. 2 Dist. 2007) 58 Cal.Rptr.3d 141, 149 Cal.App.4th 1353.....15

STATUTES

Cal. Code Civ. Proc. §170.1 (a)(8)(b)(ii).....6

Cal. Code Civ. Proc. §170.1(a)(8)(b)(ii).....6

Cal. Code Civ. Proc. §170.1 (a)(4).....6

Cal. Code Civ. Proc. §170.1.....5

Cal. Code Civ. Proc. §170.1(a)(4).....6

Cal. Code Civ. Proc. §170.1(3)(c).....14

Cal. Code Civ. Proc. §170.1(c)(3).....14

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JEFFREY R. GOLIN,
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LY BELSHÉ, ARNOLD SCHWARZENEG-
GER, COUNTY OF SANTA CLARA, and
SANTA CLARA COUNTY BOARD OF SU-
PERVISORS, JAMIE BUCKMASTER,
MARY GREENWOOD, MALORIE M.
STREET, JACQUI DUONG, RANDY HEY,
SAN ANDREAS REGIONAL CENTER,
INC., SANTI J. ROGERS, MIMI KINDER-
LEHRER, TUCKER LISKE, LISA WENDT,
R.N., NANCY J. JOHNSON, CITY OF PALO
ALTO, LORI KRATZER, EDNA MANTIL-
LA, dba EMBEE MANOR, ROSELILY TAL-
LA, ANSELMO TALLA, dba TALLA HOUSE,
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**CERTIFICATE OF INTERESTED ENTI-
TIES OR PARTIES**

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Superior Court Assigned Judge:

Hon. Thomas P. Breen

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(California Rules of Court, Rule 14.5)

| Name of Interested Entity or Person | Nature of Interest |
|-------------------------------------|---|
| 1. CLIFFORD B. ALLENBY | <i>Defendant, fmr. Dir., Dept. of Developmental Disabilities, State of California, now Dir. Dept. of Social Services, as former conservator of Nancy Golin for state Department of Developmental Services</i> |
| 2. THERESA DELGADILLO, | <i>Defendant, current Dir., Dept. of Developmental Disabilities, State of California, current state conser- vator of Nancy Golin</i> |
| 3. H. DEAN STILES, | <i>Defendant, Lead Attorney, Office of Legal Affairs, Department of Developmental Disabilities, State of California, lead attorney for DDS in Nancy Golin's case.</i> |
| 4. S. KIMBERLY BELSHÉ, | <i>Defendant, Secretary, Health and Human Services Agy., State of California, supervising Department of Developmental Services</i> |

| Name of Interested Entity or Person | Nature of Interest |
|--|--|
| 5. ARNOLD SCHWARZENEGGER, | <i>Defendant, Governor, State of California, direct supervisor of HHS and DDS</i> |
| 6. COUNTY OF SANTA CLARA, and SANTA CLARA COUNTY BOARD OF SUPERVISORS | <i>Defendant, supervisor of County defendants Buckmaster, Street, Greenwood, Hey, Duong, and Office of Public Defender and Office of District Attorney</i> |
| 7. JAMIE BUCKMASTER, | <i>Defendant, Program Manager, Santa Clara County Adult Protective Services</i> |
| 8. MARY GREENWOOD | <i>Defendant, County Public Defender, Santa Clara County, supervisor of Street and head of County Office of Public Defender</i> |
| 9. MALORIE M. STREET | <i>Defendant, Deputy Public Defender, Santa Clara County Office of Public Defender, appointed to represent Nancy Golin in probate court</i> |
| 10. JACQUI DUONG | <i>Defendant, Office of County Counsel, Santa Clara County, concurred with Hey, County, Kratzer, Buckmaster during unlawful seizure of Nancy Golin</i> |
| 11. RANDY HEY | <i>Defendant, Dpty. District Attorney, Santa Clara County, Office of District Attorney, prosecuted Golins at DDS' behest</i> |
| 12. SAN ANDREAS REGIONAL CENTER, INC. | <i>Defendant, pursued conservatorship of Nancy Golin and acts as "acting arm" of state in conservatorship</i> |
| 13. SANTI J. ROGERS | <i>Defendant, Director of San Andreas Regional Center, the acting arm of DDS for conservatorships in a four county South Bay area</i> |
| 14. MIMI KINDERLEHRER, | <i>Defendant, Regional Manager, for Defendant San Andreas Regional Center, Inc., supervising Nancy Golin's state conservatorship</i> |
| 15. TUCKER LISKE | <i>Defendant, District Manager for Defendant San Andreas Regional Center, Inc., directly supervising Nancy Golin's state conservatorship</i> |
| 16. LISA WENDT, R.N., | <i>Defendant, Staff Nurse for Defendant San Andreas Regional Center, Inc., directly supervising Nancy Golin's health care in state conservatorship</i> |
| 17. NANCY J. JOHNSON | <i>Defendant, Partner in San Jose law firm of Berliner-Cohen, Attorney for Acting Conservator, Defendant San Andreas Regional Center, Inc., in Nancy's Golin's conservatorship</i> |
| 18. CITY OF PALO ALTO | <i>Defendant, Municipal supervisory authority over Palo Alto Police Department and Defendant Lori Kratzer, Detective, and other Does</i> |
| 19. LORI KRATZER | <i>Defendant, Former Detective, Palo Alto Police Department, in Golin's case, now witness assistant for FBI in San Francisco</i> |
| 20. EDNA MANTILLA, dba EMBEE MANOR | <i>Defendant, Owner and proprietor of Residential Care Facility, Embee Manor, where Nancy was first taken and housed after Stanford from December 2001, until January 2004.</i> |
| 21. ROSELILY TALLA, ANSELMO TALLA, dba TALLA HOUSE or TALLA CARE HOMES | <i>Defendants, Married partners and co-owners of Talla Care Homes, Residential Care Facility where Nancy is currently housed since January 2004.</i> |
| 22. STANFORD HOSPITAL AND CLINICS, INC. | <i>Defendant, Palo Alto, Stanford University teaching hospital, where Nancy was first taken and is currently being seen.</i> |

| Name of Interested Entity or Person | Nature of Interest |
|-------------------------------------|---|
| 23. GEORGIANNA LAMB | <i>Defendant, former temporary conservator and “advocate” appointed by San Andreas Regional Center, for Nancy Golin</i> |
| 24. MARVIN P. MASADA | <i>Defendant, primary care doctor for Nancy Golin, working for SARC since 2002.</i> |

Respectfully Submitted, this September 20, 2007.

_____ Date: _____

David J. Beauvais, Esq.

Specially Appearing Attorney for Plaintiffs-

Petitioners

Elsie Y. Golin and Nancy K. Golin

_____ Date: _____

Jeffrey R. Golin,

Petitioner, In Propria Personam

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plaintiff-petitioner in propria personam

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Defendants-Real Parties in Interest,

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**VERIFIED PETITION FOR WRIT
OF MANDATE TO DISQUALIFY
JUDGE FOR CAUSE UNDER CCP
170.1(a)(4) CHALLENGE (CCP §1085,
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EMERGENCY STAY REQUESTED

Stay of September 21, 2007 proceedings
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motions to strike

Superior Court Assigned Judge:

Hon. Thomas P. Breen

**VERIFIED PETITION FOR WRIT OF MANDATE TO DISQUALIFY JUDGE UN-
DER CCP 170.1 CHALLENGE FOR CAUSE, AND STAY
(CCP §§1085, 170.3(6)(d))**

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SIXTH APPELLATE DISTRICT OF THE STATE OF CALIFORNIA:

Petitioners JEFFREY R. GOLIN, ELSIE Y. GOLIN AND NANCY K. GOLIN, hereby respectfully petition this Honorable Court to issue a writ of Mandate and Stay to Respondent Superior Court of the State of California, County of Santa Clara, to obtain an order:

1. Issue an emergency stay of proceedings to prevent Judge Breen, who should recuse himself but refuses to do so, from proceeding in the clear absence of authority,
2. Instruct Hon. Thomas P. Breen, assigned judge for all purposes, to be disqualified for cause, conflict of interest under CCP §§170.1(c)(1), 170.1(a)(4), and take no further action in this matter
3. Instruct the Clerk of the Court of Santa Clara County to assign an impartial judge to this matter or move the matter out of this County to a neutral venue where all services can be provided.
4. Void Judge Breen's previous order denying change of venue

BY THIS PETITION, PETITIONER HEREBY ALLEGES:

PROCEDURAL SUMMARY

1. Last Sunday, September 16, 2007, Plaintiff JEFFREY GOLIN ("Golin") learned of facts disqualifying the appointed Hon. Thomas P. Breen in the aforementioned matter for cause on grounds of conflict of interest.
2. Golin learned that Judge Breen is a trustee and (past) president of Gavilan Community College of Gilroy, a Member of a State Community College System, a division of the State of California, a "party" here represented by the State Attorney General's Office. Researching the applicable statutes, Golin immediately realized that under Cal. Code Civ. Proc. §§170.1(a)(4), 170.1(a)(8)(b)(ii) Judge Breen had a conflict of interest and was disqualified from acting.
3. The very next day, Monday, September 17, 2007, immediately preceding the hearing on demurrers and other pre-trial motions at 9:00 a.m. before Judge Breen scheduled that

day, Golin served the judge with a Cal. Code Civ. Proc. §170.1 Challenge for Cause (Exhibit A), on the grounds of Cal. Code Civ. Proc. §§170.1 (a)(4), 170.1 (a)(8)(b)(ii).

4. The CCP §170.1 challenge (Exhibit A) simply read:

“It has come to the attention of plaintiff Jeffrey Golin that Judge Breen is disqualified from proceeding with the aforesaid matter, because under the provisions of Cal. Code Civ. Proc. 170.1(a)(4), he has a direct conflict of interest in that he is an officer *and* trustee of a “party” to the lawsuit, the State of California, according to the statutory definition under 170.1(a)(8)(b)(ii).

This statutory section states in relevant part:

“170.1. (a) A judge shall be disqualified if any one or more of the following is true:...

...(4) The judge, ... is ... an officer... or trustee of a party.”

A party is defined for purposes of this section by 170.1(a)(8)(b)(ii):

“‘Party’ includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.”

“Judge Breen has a direct and unwaivable conflict of interest because he is the President *and* Trustee of the Board of Directors of Gavilan College of Gilroy, (Santa Clara County), a subsidiary of the California State Community College System and thus a legal affiliate of the State of California and its subdivisions, a party in this lawsuit, being represented here by the State Attorney General’s Office. He is therefore **both** an officer **and** a trustee of a “party”.

5. Judge Breen’s affiliation with the State would therefore at the least compromise his ability to be impartial in the present proceedings, potentially subjecting him to pressures from the State by virtue of his position.
6. Judge Breen accepted service of the challenge and read and researched the authorities, coming out of chambers 45 minutes later. Judge Breen refused to recuse himself, because he purported that the disqualification motion was “untimely” because it should have been filed earlier before he made any rulings, and since he ruled on the motion to change venue, it was too late. He made no ruling or expressed any opinion as to the sufficiency of law or fact causing grounds for disqualification, and filed no Answer.
7. Golin and co-plaintiffs’ counsel David Beauvais took exception, informing Judge Breen that this reason applied to a CCP §170.6 peremptory challenge which he could object to

on timeliness issues, but not to a CCP §170.1 which could be filed at any time during the proceedings, Judge Breen disagreed, verbally citing *Alhusainy v. Superior Court*, (2006) 143 Cal.App.4th 385, 48 Cal.Rptr.3d 914, for the reputed proposition that a challenge for cause under CCP §170.1 may purportedly be disregarded as untimely filed.

8. Judge Breen's refusal to recuse himself was made without written statement or filing of an Answer, by truncated remarks from the bench. Both Mrs. Golin's attorney Mr. David J. Beauvais and Golin felt sure that this was not likely to be correct according to long-established case law. Judge Breen in effect conceded the facts¹ giving cause to the challenge and the conflict of interest it entails.
9. When Judge Breen was informed that he could not rule on his own disqualification (CCP §170.3(c)(5)), Judge Breen remarked that he was not ruling on his own disqualification, but only the timing, (which amounts to the same thing).
10. Judge Breen then proceeded to hear and decide various pre-trial matters before the Court and to calendar additional hearing on Friday, September 21, 2007, to make rulings dispositive of the entire case, which he apparently intends to preside in spite of his disqualification.
11. Mr. Beauvais and Golin were not in a position examine *Alhusainy* in the courtroom, but Golin looked this citation up on Westlaw in the afternoon after the hearing. Golin found that Judge Breen had either carelessly misread this authority because *Alhusainy* did not stand for the proposition it was purported to represent by the judge, or was demonstrating a whimsical disregard for the statutory scheme. It did not apply to CCP §170.1 challenges for cause, but only to subsequent CCP §170.3 disqualifications when a judge that should be disqualified refuses to do so, as here, and were not filed at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.
12. In fact, also, the §170.1 challenge here was in fact without any delay after the facts constituting grounds for disqualification were discovered. *Alhusainy* has nothing to do with timeliness on account of the judge making some rulings on the case, as with

¹ Judge Breen's only denial was that he was no longer a president (officer) of Gavilan College which was assigned on a rotating basis, but he admitted he was still a trustee.

§170.6. *Alhusainy* obviously does not apply here because we are filing this disqualification notice the next court day pursuant to CCP §170.3(c)(1).

13. Judge Breen therefore “pass[ed] upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party” violating CCP 170.3(c)(5). “A judge may not pass on his own disqualification”, *Aetna Life Ins. Co. v. Lavoie* 475 U.S. 813 (1986), *Liljeberg v. Health Services Acquisition Corp.* 108 S.Ct. 2194 (1988).
14. Ominously, Judge Breen then proceeded to demonstrate bias by refusing to appoint a *guardian ad litem* for Nancy Golin as previously decided or indicate a process whereby that should be done *before* hearing demurrers, and would not grant my request for oral argument on Friday September 21, in contravention of the right to a hearing especially on the demurrers, expressly authorized under *Medix Ambulance Service, Inc. v. Superior Court*, (2002) 118 Cal.Rptr.2d 249.
15. On the next day, September 18, 2007, Golin filed a Verified Statement with the Clerk of the Court attesting to these events and requesting again that Judge Breen be disqualified according to the provisions of CCP 170.3(c)(1). No action has been taken on this request.

NECESSITY FOR STAY

If Judge Breen is permitted to proceed to demurrers with an uncontested conflict of interest, it will do immediate and irreparable injury to the rights of the plaintiffs to have their dispositive pre-trial motions heard before an impartial judge in a neutral county, or at least their right to the appearance of justice in their proceeding. Judge Breen may proceed to dispose of their case before his disqualification is effectuated, and thus precious judicial resources may be wasted by the judge issuing void or voidable rulings that would have to be relitigated. If Judge Breen cannot or will not correctly distinguish such a simple basic point of law like this, one must ask how he can be expected to inspire confidence in his appearance of impartiality on other far more complex issues dispositive of the entire case?

RELIEF REQUESTED

WHEREFORE, Petitioners pray at a minimum that this Court provide an order commanding the court below to:

1. Issue an emergency temporary stay of proceedings to prevent Judge Breen, who should recuse himself but refuses to do so, from proceeding in the clear absence of authority,
2. Instruct Hon. Thomas P. Breen, assigned judge for all purposes, to be disqualified for cause, conflict of interest under CCP §§170.1(c)(1), 170.1(a)(4), and take no further action in this matter
3. Order the matter be referred to the Judicial Counsel for reassignment.
4. Void Judge Breen’s previous order denying change of venue.

Respectfully submitted, this 20th Day of September 2007

_____ Date: _____
David J. Beauvais, Esq.

*Specially Appearing Attorney for Plaintiffs-
Petitioners*

Elsie Y. Golin and Nancy K. Golin

_____ Date: _____
Jeffrey R. Golin,
Petitioner, In Propria Personam

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SORS, JAMIE BUCKMASTER, MARY
GREENWOOD, MALORIE M. STREET,
JACQUI DUONG, RANDY HEY, SAN AN-
DREAS REGIONAL CENTER, INC., SANTI
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TUCKER LISKE, LISA WENDT, R.N., NAN-
CY J. JOHNSON, CITY OF PALO ALTO,
LORI KRATZER, EDNA MANTILLA, dba
EMBEE MANOR, ROSELILY TALLA,
ANSELMO TALLA, dba TALLA HOUSE,
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DOES, 1-50,**

Defendants-Real Parties in Interest,

**Court of Appeal Case No.:
Superior Court Case No.: 1-07-cv-082823**

**VERIFICATION OF PETITIONER-
PLAINTIFF JEFFREY R. GOLIN**

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Superior Court Assigned Judge:
Hon. Thomas P. Breen

VERIFICATION OF PETITIONER JEFFREY R. GOLIN

I declare under penalty of perjury that I have read the foregoing Petition for Writ of Man-
date and Stay and find the facts set forth to be true and correct to the best of my direct first-
hand personal knowledge, and this verification was executed on September 20, 2007 at San
Jose, California

Jeffrey R. Golin, Petitioner

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Defendants-Real Parties in Interest,

**Court of Appeal Case No.:
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cv-082823**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
VERIFIED PETITION FOR WRIT
OF MANDATE TO DISQUALIFY
JUDGE FOR CAUSE UNDER CCP
170.1(a)(4) CHALLENGE (CCP §1085,
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Superior Court Assigned Judge:
Hon. Thomas P. Breen

STATEMENT OF THE CASE

This case involves a civil lawsuit for damages and injunctive relief brought by JEFFREY R. GOLIN, ELSIE Y. GOLIN and NANCY K. GOLIN against the Directors of state agencies for the developmentally disabled, CLIFFORD B. ALLENBY and THERESE DELGADILLO, various of their employees and supervisors, local SANTA CLARA COUNTY governmental entities and officials, CITY OF PALO ALTO and individual police, STANFORD HOSPITAL, SAN ANDREAS REGIONAL CENTER (“SARC”), various doctors, care home providers, and other persons and Does.

This case was caused by the improper and illegal personal seizure of the Golins' adult autistic disabled daughter NANCY K. GOLIN ("Nancy") from her family on November 15, 2006 by police in Palo Alto, California, in violation of the Fourth Amendment without warrant, emergency or probable cause. Two weeks later, after the parents went to the press, police arrested and falsely charged the parents with felony abuse and neglect. The parent-petitioners bailed out immediately. They were maliciously prosecuted for 14 months after showing proofs of lack of probable cause, before their criminal charges were cleared (Exhibit B). The parents contend the record shows the charges were fraudulent and fabricated, designed to buy time to help the state get conservatorship of Nancy. Nancy was severely abused and neglected and suffered repeated injury and drugging in the residential care facilities where she was illegally placed. Her injuries included fractures, esophageal lesions and hernias, denial of emergency medical care, status epilepticus, neurological impairment from drugs, dental neglect, emotional abuse, and several near-death emergency hospitalizations due to caregiver neglect and medical malpractice.

After being in unlawful state custody for two years, Nancy was subsequently conserved by the state of California, CLIFFORD B. ALLENBY, Director of Department of Developmental Services ("DDS"), in a biased and fundamentally unfair court trial lasting 3 weeks before a Santa Clara County probate judge, Hon. William F. Martin. Martin supposedly applied a clear and convincing standard, although not one significant finding of fact bore any relationship to the evidence shown. Parents challenged Martin's disputed findings, claiming they were based on predisposition, institutional bias and fraud by defendants upon the court, October 19, 2003. Review of abuses of discretion either by appeal or annual review in Santa Clara County Superior Court or in the Sixth District Court of Appeals were blocked by permitted actions of defendants. To date, no court has allowed the Golins' substantial damages or civil rights claims be heard on their merits. The plaintiffs have been forced to have supervised visits with each other *for five years*, notwithstanding that defendants have made no showing of cause for justifying restrictions, and SARC's powers to limit social contacts are purely discretionary for SARC, despite not having been ordered by a court.

Defendants here have proceeded for five years on the shaky presumption that their conservatorship and their influence and connections in Santa Clara County makes them lawsuit-proof, stripping Nancy Golin of any and all possible relief and removing standing for her family to fairly represent Nancy's damages claims and injunctive relief. The Golins allege attaining the conservatorship is defendants' central motivation, even underlying the criminal charges. Using their conservatorship powers these state actors have counted on blocking all avenues for discovery or litigation against themselves, while they pursue their abusive, lucrative and illegal policies. So far they have gotten away with it. Nancy's rights, personal safety and emotional well-being have been stripped from her without any legal recourse while the parents have been slandered, maliciously prosecuted and defamed by inference as a means of justifying these defendants' actions.

LEGAL ARGUMENT

I.CCP §170.1 CHALLENGES FOR CAUSE ARE NEVER “UNTIMELY” IF AS HERE THEY ARE PRESENTED AT THE EARLIEST PRACTICABLE OPPORTUNITY AFTER DISCOVERY OF THE FACTS CONSTITUTING THE GROUNDS FOR DISQUALIFICATION, WHETHER THE JUDGE HAS ALREADY MADE RULINGS OR NOT

Judge Breen was clearly in error or confused when he ruled that the 170.1 challenge for cause was “untimely”, because he had already made several rulings, and the case he cited to support his ruling *Alhusainy v. Superior Court*, (2006) 143 Cal.App.4th 385, 48 Cal.Rptr.3d 914, was clearly inapposite and did not stand for the proposition it was purported to represent.

“The issue of disqualification must be raised at the earliest reasonable opportunity after the party becomes aware of the disqualifying facts”. *North Beverly Park Homeowners Ass'n v. Bisno* (App. 2 Dist. 2007) 54 Cal.Rptr.3d 644, 147 Cal.App.4th 762, rehearing denied, review denied. That is the only timeliness requirement for a CCP §170.1, which has been followed here. Any party may file a 170.1 challenge for cause at any time, even during trial or after judgment, if a judge is discovered to have been disqualified – that is the firmly established rule that has never been overruled or negatively distinguished.

In *Alhusaini*, the complaining party allegedly waited four years after the facts constituting the grounds for disqualification were clearly known to him, and then waited to see if

the rulings were going the way he wanted before filing his 170.1 challenge thus gaming the system, not at the “first practicable opportunity”. There is nothing to suggest in *Alhusaini* that it applied the rules for a CCP §170.6 challenge for bias by failing to file in the necessary time prior to the first hearing, as Judge Breen seemed to suggest.

Judge Breen’s reliance on *Alhusaini* is entirely misplaced. There is nothing whatever in the record to suggest that plaintiff-petitioners either knew that Judge Breen had a *prima facie* conflict of interest and was thus disqualified, or that they failed to act immediately when the facts constituting the grounds for disqualification became known to them. In fact it appears the exact opposite was true. The written CCP §170.1 challenge for cause (Exhibit A) was personally served on the judge in court *on the day after these facts were discovered* (September 17, 2007), before the hearing and before any further proceedings had commenced, and the Verified Statement of Notice of Disqualification (CCP §170.3(c)(1)) (Exhibit B) was filed with the clerk the following day.

The case had only had one prior brief hearing before Judge Breen a few weeks before on an initial matter (August 23, 2007), and only one non-dispositive ruling had been made in that hearing. Judge Breen was unavailable, even for two attempted *ex parte* motions by parties when the other parties were available the preceding week, because he refused to come to court when requested by the Clerk. Even if the facts had been discovered as much as a week before – which they was not – it would have thus been impossible to serve it on the judge when he was in the courthouse before the date of the hearing because as an assigned judge he was only there when the scheduled hearings took place.

II. REGARDLESS OF TIMING, JUDGE BREEN HAD A GREATER DUTY TO DISCLOSE HIS CONFLICT OF INTEREST WITHOUT BEING CHALLENGED.

“The duty to disclose is greater than the duty to disqualify”, meaning that Judge Breen was already under a duty to familiarize himself with any possible conflicts of interest (CCP §170.1(3)(c)) and disclose any possible conflicts immediately to the parties. The burden of the judge to disclose is greater than the burden of the parties to disqualify for cause. It is not up to the plaintiffs to discover conflicts of interest invoking a CCP §170.1 whether in a timely manner or not. “Although a party has an obligation to act diligently, he or she is not required to launch a search to discover disqualifying information that a judge should

have disclosed,” *Christie v. City of El Centro* (App. 4 Dist. 2006) 37 Cal.Rptr.3d 718, 135 Cal.App.4th 767, review denied. See also, (*Urias, supra*, 234 Cal.App.3d at p. 425, 285 Cal.Rptr. 659 [party not required to investigate to ascertain a judge's former clients]; *Betz, supra*, 16 Cal.App.4th at pp. 935, 937, 20 Cal.Rptr.2d 841 [parties not required to investigate to ascertain clients of law firm in which arbitrator had been a partner].)

The judge must not proceed in spite of a conflict of interest that he is or should be aware of, or only recuse after being found out. Thus the burden is not on the **parties** to make a *timely* discovery of facts constituting grounds for disqualification under §170.1.

III. JUDGE BREEN MAY NOT PROCEED BY IGNORING THE CHALLENGE WITHIN FILING AN ANSWER AND FORCE THE PARTIES TO PROCEED NOTWITHSTANDING A CONCEDED CONFLICT OF INTEREST.

It is also improper for a judge to refuse to disqualify himself and force the parties to proceed in spite of knowing he has an admitted conflict of interest

As to the legislative purpose, “Statutes governing disqualification of judges for cause are intended to ensure public confidence in the judiciary and to protect the right of the litigants to a fair and impartial adjudicator”. *Rossco Holdings Inc. v. Bank of America* (App. 2 Dist. 2007) 58 Cal.Rptr.3d 141, 149 Cal.App.4th 1353, modified on denial of rehearing. See also, *Peracchi v. Superior Court* (2003) 135 Cal.Rptr.2d 639, 30 Cal.4th 1245, 70 P.3d 1054, rehearing denied.

IV. JUDGE BREEN WAS ALREADY DISQUALIFIED BEFORE HE COMMENCED TO PRESIDE OVER THE ACTION

Disqualification of a judge occurs when the facts creating disqualification arise, not when disqualification is established, *Christie v. City of El Centro* (App. 4 Dist. 2006) 37 Cal.Rptr.3d 718, 135 Cal.App.4th 767, review denied.

This would mean that Judge Breen was disqualified before he took the case because the facts creating the disqualification (trusteeship at Gavilan) already had arisen prior to his accepting appointment, not when the facts were discovered, and thus his rulings are voidable on objection.

V. JUDGE BREEN’S RULINGS ARE VOID OR VOIDABLE

Except in very limited circumstances not applicable here, a disqualified judge has no power to act in any proceedings after his or her disqualification. (CCP §170.4(c)) *Christie*

v. *City of El Centro* (App. 4 Dist. 2006) 37 Cal.Rptr.3d 718, 135 Cal.App.4th 767, review denied.

The acts of a judge subject to disqualification are void or, according to some authorities, voidable. (*Giometti v. Etienne* (1934) 219 Cal. 687, 688-689, 28 P.2d 913 (*Giometti*); *Urias, supra*, 234 Cal.App.3d at p. 424, 285 Cal.Rptr. 659; *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 939-940, 20 Cal.Rptr.2d 841 (*Betz*).

Relief is available to a party who, with due diligence, discovers the grounds for disqualification only after judgment is entered or appeal filed. (*Urias v. Harris Farms, Inc.* 234 Cal.App.3d 415, 424-425)

CONCLUSION

Judge Breen **must** immediately disqualify himself from any further actions in this matter, or file an answer disputing the facts or law in the underlying challenge to be ruled on by an uninterested judge. “The question of disqualification [must] be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson. The clerk [must] notify the executive officer of the Judicial Council of the need for a selection. The selection [must] be made as expeditiously as possible.” (Cal. Code Civ. Proc. §170.3(c)(5)). In addition, Judge Breen’s prior ruling denying a change of venue should be voided.

Respectfully Submitted, this 20th Day of September, 2007.

_____ Date: _____

David J. Beauvais, Esq.
*Specially Appearing Attorney for Plaintiffs-
Petitioners*
Elsie Y. Golin and Nancy K. Golin

_____ Date: _____
Jeffrey R. Golin,
Petitioner, In Propria Personam

CERTIFICATION OF WORD COUNT

I, Jeffrey R. Golin, hereby declare:

In preparing this document using the Microsoft Word 2003 program in my computer, and in reliance on the word count function thereof, I hereby certify that this Petition, including footnotes, but excluding the cover, tables, certifications, the proofs of service and the exhibits is 4,397 words. The word limit for petitions for writs of review is 8,400 words (CRC Rule 28(d)(1)), including footnotes but excluding tables, certificates and attachments governed by CRC Rule 56(a)(1), CRC Rule 14(c)(1), and CRC Rule 14(c)(3).

Dated: _____

Jeffrey R. Golin

TABLE OF EXHIBITS

| | | |
|----------------|--------------------------------------|----------------|
| Exhibit A..... | CHALLENGE FOR CAUSE | Sept. 17, 2007 |
| Exhibit B..... | VERIFIED NOTICE OF DISQUALIFICATION, | Sept 18, 2007 |

**IN THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

**JEFFREY R. GOLIN, ELSIE Y. GOLIN
NANCY K. GOLIN**

Plaintiffs-Petitioners,

v.

**SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF SAN-
TA CLARA, ,**

Respondent

CLIFFORD B. ALLENBY, et al

Defendants-Real Parties in Interest,

Court of Appeal Case No.:
Superior Court Case No.: 1-07-cv-082823

**PROPOSED ORDER GRANTING
WRIT OF MANDATE**

EMERGENCY STAY REQUESTED
Stay of September 21, 2007 proceedings
deciding various demurrer motions and
motions to strike

Superior Court Assigned Judge:
Hon. Thomas P. Breen

**TO THE COURT, DEFENDANTS COUNTY OF SANTA CLARA AND YOUR AT-
TORNEYS, SAN ANDREAS REGIONAL CENTER AND YOUR ATTORNEYS,
AND ALL OTHER INTERESTED PARTIES:**

Plaintiff Jeffrey Golin moved for a writ of mandate requiring that Judge Thomas P. Breen, be removed for cause on a statutory conflict of interest (CCP §170.1) regarding the accompanying writ of mandate.

THE COURT FINDS that proper notice of this application has been given, and the order is necessary for the reasons set forth in the verified petition of Jeffrey Golin filed September 20, 2007.

Accordingly, good cause appearing:

IT IS SO ORDERED:

1. The application is **GRANTED**. (DENIED)
2. Judge Breen is to be disqualified from taking any further actions in this case and his past order to be voided.

-----Dated

Justice of the Sixth District Court of Appeal

Golin et al. v. Allenby et al.
Santa Clara Superior Court Case No. 1-07-CV-082823

PROOF OF SERVICE

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action; my business address is 249 California Ave., Palo Alto, CA 94306. I am readily familiar with the business practices of the collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

**VERIFIED PETITION FOR WRIT OF MANDATE TO DISQUALIFY JUDGE
UNDER CCP 170.1 CHALLENGE (CCP §1085, 170.3(6)(d)), AND STAY**

On September 20, 2007, I served the following documents:

() Via Federal Express Next Day Business Day and paid for by sender to the persons noted who have appeared in this case on the attached Service List:

() Via e-mail to the persons noted on the attached Service List

() Via Personal Delivery to the persons noted on the attached Service List.

(xx) Via First Class Mail to the persons noted on the attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed September 20, 2007, at Palo Alto, California.

Regina Kaska

SERVICE LIST, 9/20/07

| Attorney | SBN | Parties | Attorney Firm/Address | Phone/Fax |
|-------------------------|------------------|---|---|--|
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| William Vickrey, | N/A | Administrative Director California Judicial Counsel | Administrative Office of the Courts 350 McAllister Street San Francisco, CA 94102-4783 | P: (415) 865-4200 |
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