Volume 26 • Number 3 2013

California Litigation

THE JOURNAL OF THE LITIGATION SECTION, STATE BAR OF CALIFORNIA

Basic Fairness:

The Administrative Immigration Courts Should Take a Lesson from our State And Federal Courts' Playbooks

By Peter Afrasiabi

Peter Afrasiabi

There are many rules and procedures our state and federal courts employ every day — rules that are generally applicable, apolitical, and focused on ensuring that the most accurate result in litigation is reached. Two such rules — which are so well-developed and entrenched that in the 21st century they are decidedly vanilla — include those that defaults should be avoided at all costs and that children need a formal guardian appointed in any litigation that stands to affect their rights.

These bedrock rules apply to all manner of substantive law in both state courts and Article III federal courts. Both were developed over centuries of law-making by common-law courts and later through positive enactments by legislatures and rules committees.

However, surprisingly, neither rule exists in the administrative immigration courts of the Executive Branch. Thus, now, during the national debate on immigration law reform, the current status of these two rules in our broad-

er legal culture and the question of whether they should be extended to the immigration court system warrant our consideration.

'Mistakes happen, and California law recognizes that if a default judgment is entered due to a mistake, excusable neglect, inadvertence, or surprise, then it may be set aside.'

Default Judgments are Avoided at all Costs

Mistakes happen, and California law recognizes that if a default judgment is entered due to a mistake, excusable neglect, inadvertence, or surprise, then it may be set aside. (Code Civ. Proc., § 473, subd. (b).) This statute reflects the fundamental policy that the law prefers trials on the merits, and so defaults are set aside using liberal standards. (*See Shamblain v. Brattain* (1988) 44 Cal.3d 474, 478.) This policy elevates the concept of affording a person his day in court over technical and procedural law. (*See Armstrong v. Armstrong* (1947) 81 Cal.App.3d 316, 319.)

Moreover, this policy has old California roots. In 1888, the California Supreme Court remarked in a divorce decree case that a judgment by default was not favored and that "it should be the aim of the court to afford the fullest possible hearing in such matters." (*McBlane v. McBlane* (1888) 77 Cal. 507, 510.) The other side to this coin is the oft-stated aphorism that the law abhors a forfeiture of one's rights. (*See Stafford v. Lick* (1857) 7 Cal. 479, 492; *see also Wooster v. Dep't of Fish & Game* (2012) 211 Cal.App. 4th 1020, 1027.)

Federal courts employ the same basic standard through the enacted Federal Rules. (Fed. Rules Civ.Proc., rule 55, 28 U.S.C. [court sets aside for good cause under Rule 60]; Fed. Rules Civ.Proc., rule 60, 28 U.S.C. [grounds for relief include "mistake, inadvertence, surprise, or excusable neglect."].) As held by the Ninth Circuit, these "rules for determining when a default should be set aside are solicitous towards movants, especially those whose actions leading to the default were taken without the benefit of legal representation." (*United States v. Signed Personal Check No. 730 of Yubran S. Mesle* (9th Cir. 2010) 615 F.3d 1085, 1089.)

This rule is not a uniquely American one, and it reflects a fundamental policy with deep historic roots. The Ancient Greeks, for example, in ordering their laws to address civil disputes, also settled upon the same basic rule. Thus, where a judgment by default was issued, the defaulted party could "plead an excuse for his default...good ground for the litigant's non-appearance." (A.R.W. Harrison, The Law of Athens — Procedure (Oxford University Press 1971) pp. 197-198.)

Children Have Guardians *Ad Litem* to Protect their Libarty and Property Interests

State law requires the appointment of a guardian *ad litem* to represent a child in any court proceeding involving the child's rights. (Code Civ. Proc., § 372, subd. (a).) And, if a judgment is entered against a child who is not represented by a guardian *ad litem*, that judgment is voidable when the child emancipates. (*See In re Charles T.* (2002) 102

Cal.App.4th 869, 875-876.) Here, again, the federal courts are similar. There, for example, when the money or claims of a child are at stake, courts require control over the proceeds and the existence of a formal guardian. (Fed. Rules Civ.Proc., rule 14, 28 U.S.C.; U.S. Dist. Ct., Local Civil Rules, Central Dist. Cal., rule 83-5.1-83-5.6.)

The reason behind these laws is that minors lack capacity to make reasoned decisions about substantial legal issues and courts need to ensure that there is full protection of minors' interests. (*See Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 46-47.) As with the default rules, the Ancient Greeks here, too, settled on the same rule. (Harrison, *supra*, at p. 84 ["Until he reached that age [end of seventeenth year] he had to be represented in all legal relations by his father or, if he were dead, by his guardian."].)

Rationale for These Rules: Basic Fairness

Without doubt, these rules were not accidentally discovered or randomly adopted. They represent the culmination of centuries of litigation during which our historical constituents of the adjudicatory process — judges, lawyers, litigants, and, ultimately, the people — settled upon them precisely because they represent a consensus judgment against arbitrariness and in favor of protecting rights. Thus, if substantive rights are to be lost, we know that they were lost only after every effort at ensuring a full factual consideration was made.

It makes sense that we continue to employ and enforce these rules in our disputes, because any one of us on any given day could be a litigant in state or federal court involved in litigation over our property or liberty rights, or those of our children. That reality ensures that these rules generally apply for the benefit of all.

If we dig deeper into the philosophical underpinnings of these two rules — rules we think about rarely in modern jurisprudential writing (after all, they are not as sensational as iPhone patents, celebrity rights of publicity against the paparazzi, or the impact of Google Glasses on modern privacy laws) — we can conceptualize them as a logical result of John Rawls's law-centric philosophical thought experiment known as the "veil of ignorance." (John Rawls, A Theory of Justice (Harvard University Press 1971) pp. 136-142.) As a means of assessing the propriety of a given rule, Rawls imagined a society shrouded in a veil of ignorance, in which none of us knows where we may land in society's social, political, economic, racial, religious, intellectual, etc. realm, but we know we will land somewhere.

In this construct, Rawls asks what given rule would we all agree to before we find out where we land. Applied to our two rules, it easy to see that from behind the veil of ignorance we would all agree that our substantive rights should not be lost by default caused by a technical or unavoidable mistake, and that children need guardians to interact with the judicial machinery that determines their rights. That our laws have codified these two rules demonstrates, at least in the legal philosopher's eyes, that we have landed on fair rules that reflect the common good and that are not the product of arbitrariness or a politicized regime of distributive justice.

These Basic Rules do — Not Apply to Litigants in — Administrative Immigration Courts

Congress did not place jurisdiction over immigration cases in the hands of our federal courts, such that the above neutral legal principles would automatically engraft onto immigration cases. Instead, immigration is vested in the Executive and, thus, in the administrative state. (*See Zadvydas v. Davis* (2001) 533 U.S. 678, 700.)

The administrative immigration state is not subject to the generally applicable set of rules developed through the iterative, interactive, complex processes that led our legal ancestors to settle on the two fundamental

rules we consider here. (*See, e.g., Sanchez v. Holder* (9th Cir. 2012) 704 F.3d 1107, 1109 [Federal Rules of Evidence inapplicable in immigration court]; *Cortez-Pineda v. Holder* (9th Cir. 2010) 610 F.3d 1118, 1123, fn.4 [Federal Rules of Civil Procedure inapplicable in immigration court].) And, at least in the context of the immigration administrative state, neither of the two rules discussed here was affirmatively created by the Executive through its power to promulgate rules governing immigration courts. (*See generally Talk America, Inc. v. Michigan Bell Tel. Co.* (2011) 131 S.Ct 2254, 2266 [agency creates rules to govern the agency's functions].)

'In immigration court, when default judgments of deportation are entered, no corresponding liberal relief from default rule exists.'

Default Judgments of — Deportations are Readily — Imposed in Immigration Court

In immigration court, when default judgments of deportation are entered, no corresponding liberal relief from default rule exists. A case of a Chinese asylum seeker is illustrative. In *Wu-Cheng v. Holder* (9th Cir. 2011) 428 Fed. App'x. 783, Mr. Wu-Cheng arrived at court at 11:00 a.m. for his hearing but his case had been called at 9:00 a.m. Having inadvertently missed his hearing, Mr. Wu-Cheng was ordered deported by default.

Under such circumstances, federal law allows an immigrant to file one motion to reopen; but it must be filed within 90 days of the deportation order, and there must be a showing of "exceptional circumstances." Unlike the rule that applies in state and federal courts, the relief from default rule in immigration court is not construed liberally and expansively with an eye towards case adjudication on the merits. Instead, it is strictly applied and severely and intentionally circumscribed.

Specifically, "[t]he term 'exceptional circumstances' refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or *serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances*) beyond the control of the alien." (8 U.S.C. § 1229a(e)(1) [emphasis added].)

Mr. Wu-Cheng met the 90-day time bar and filed his motion to reopen, explaining that his lawyer told his translator the hearing was at 9:00 a.m. but the translator erred and mistakenly told him it was at 11:00 a.m. instead. The translator testified under penalty of perjury to these facts, which were uncontested by the United States government. (428 Fed. Appx. at p. *1.) But the immigration courts found that a third party translator's error was not an exceptional circumstance (*ibid.*) — that, given the definition above, the translator error was less compelling than battery or extreme cruelty to the alien. The immigration courts thus reaffirmed the default deportation order without reviewing the merits. (*Ibid.*)

In the immigration courts, then, Mr. Wu-

Cheng was ready to defend himself and to make a factual showing of a right to seek asylum in the United States; but he was denied that right because of an odd conflux of events that led to a default deportation judgment based on a two-hour delay. No doubt, if the otherwise generally applicable state and federal standards had applied, Mr. Wu-Cheng would have had his day in court and his case would have been considered on the merits. Thus, whereas our federal and state courts have adopted a policy of substance over technical form, in immigration court, because of the absence of positive law addressing relief from default to cover the myriad human circumstances that require such relief, form routinely trumps substance.

Unaccompanied Immigrant — Children Seeking Asylum — have no Guardian *Ad Litem*

In immigration court, there is no guardian *ad litem* rule for children who seek asylum. Precisely because we have foreign, unaccompanied children involved in immigration court cases, bills have been introduced in Congress to provide guardian *ad litem* protections. In 2007, Senator Dianne Feinstein introduced the Unaccompanied Alien Child Protection Act of 2007, which sought to create what are, in effect, government-appointed guardians *ad litem* for unaccompanied children. (*See* Unaccompanied Alien Child Protection Act of 2007, Section 201(a)(3), Senate Bill No. 844, introduced March 12, 2007.) Ultimately, this bill died on the political grapevine.

In our state and federal systems, guardians are required for any adjudication of a child's property or liberty interests. Absent that guardian, no judgment taking a child's property can stand. (*In re Charles T.*, 102 Cal.App. 4th at pp. 875-876.) In immigration court, a child's liberty interest is at stake, and that very liberty interest is also of constitutional dimension. (*See Bridges v. Wixon* (1945) 326 U.S. 135, 154 ["Here the liberty of an individual is at stake.... Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.... Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."].) But in immigration court, that child is left to defend himself or herself without a guardian.

Closing this child-centric legal gap between the administrative state and our historical courts is necessary in order to maintain fidelity to the animating principles of the basic requirement that children have guardians — namely, so that that we may ensure that our adjudication of their rights is legitimate.

The two rules considered above have existed for millennia in our legal heritage precisely because we recognize that substance is more important than technicalities, a day in court matters when the person stands ready to be heard, and children need protection before their rights are impacted. Both of these rules are politically neutral procedural prerequisites designed to help guarantee that the ultimate allocation of rights in a court system occurs on a fair playing field.

Extending these basic rules to immigration court proceedings ensures that before we deport people back to a country that may harm them, we can know that they had a full and fair day in court. And if we draw back Rawls's veil of ignorance even further, we find philosophical policy support, too. Less than five percent of the world is born into the United States, and I suspect that we would all want to know that if, facing those odds, we needed to flee torture and oppression to get to America, then we would get our day in an American court to plead our case.

.....

Peter Afrasiabi is a founding partner of One LLP, an intellectual property and entertainment litigation law firm based in Newport Beach. Peter has handled numerous immigration appeals in the Ninth Circuit Court of Appeals and has written about his experience in, Show Trials: How Property Gets More Legal Protection than People in Our Failed Immigration System (Envelope Books 2012).