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REPRESENTING MINORS ON APPEAL

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There are unique considerations for appellate counsel to keep in mind when representing minors in dependency appeals that contrast with the representation of parents. For example, in addition to the minor client themselves, there will always be a guardian ad litem involved. Although the guardian ad litem is typically the minor's trial counsel, that is not always the case. Appellate counsel may also need to take steps to understand what has happened in the case since the filing of the notice of appeal in order to assess what is in the best interests of their minor client. This article aims to provide a general overview of the representation of minors on appeal and provide some practical tips for the appellate practitioner.

I. Top Five Take-Aways.

1. A minor will always have a court-appointed guardian ad litem that may or may not also be the minor's trial counsel. (See *In re Josiah Z.* (2005) 36 Cal.App.4th 664, 679-680.)
2. In the juvenile court, a minor's trial counsel plays a dual role of representing the wishes of the minor as well as the minor's best interests. (See *In re Celine R.* (2003) 31 Cal.4th 45, 60.)
3. While minor's trial counsel has special statutory duties including the requirement to make recommendations to the juvenile court, these same duties do not necessarily apply to appellate counsel. (See Welf. and Inst. Code, § 317, subd. (e)(1); see also *In re Zeth S.* (2003) 31 Cal.4th 396, 409, 414-415.)
4. Appellate counsel should contact the minor's trial counsel and/or guardian ad litem very early in the appeal.
5. Appellate counsel must obtain authorization from the minor's guardian ad litem before seeking to dismiss an appeal and before taking a position on appeal contrary to the position taken on the minor's behalf below.

II. The Representation of Minors in the Juvenile Court.

To best understand representing children on appeal, it is important to understand the roles of those individuals who represent the interests of children in the juvenile court.

A. Guardian ad litem.

California courts require that a minor be appointed a guardian ad litem in dependency cases involving child abuse or neglect. (Welf. & Inst. Code, § 326.5; Cal. Rules of Court, rule 5.662(c); see 42 U.S.C. § 5106a(b)(2)(B)(xiii); *Josiah Z.*, *supra*, 36 Cal.4th at pp. 679-680.) To protect the interests of minors in civil matters generally, a guardian ad litem or similar representative is necessary. (*De Los Santos v. Superior Court* (1980) 27 Cal.3d 677, 683-684.) Specifically in the dependency cases, a guardian ad litem is also required for a minor in order to comply with the federal Child Abuse Prevention and Treatment Act (CAPTA). (*Josiah Z.*, *supra*, 36 Cal.4th at p. 679.) The guardian ad litem is supposed to “represent and protect the rights and best interests of the child.” (*Ibid.*) By default, the guardian ad litem is the minor’s trial counsel, but if no counsel has been appointed, it can be the minor’s court appointed special advocate (CASA). (Welf. & Inst. Code, § 326.5; *Josiah Z.*, *supra*, 36 Cal.4th at pp. 679-680; *San Diego Dept. of Social Serv. v. Superior Court (Miguel S.)* (2005) 134 Cal.App.4th 761, 768.)

Note that there is a slight difference between the role of a guardian ad litem in the broader civil context and the role of a guardian ad litem in dependency cases. In civil matters, there is “a recognition by the Legislature that whenever a minor is involved in litigation, his interests cannot be protected unless a guardian ad litem or a similar representative acts for him. The guardian ad litem is an officer of the court, [who] has the right to

control the lawsuit on the minor’s behalf.” (*De Los Santos v. Superior Court, supra*, 27 Cal.3d at pp. 683-684.) These principles do not automatically extend to the dependency context, which has its own specific rules and statutes. (See *Josiah Z., supra*, 36 Cal.4th at pp. 678-680.)

California Rules of Court, rule 5.662, provides that the “general duties and responsibilities of a CAPTA guardian ad litem are: (1) to obtain firsthand a clear understanding of the situation and needs of the child; and (2) [t]o make recommendations to the court concerning the best interest of the child” In other words, the minor’s guardian ad litem has an affirmative duty to investigate the circumstances of the case and the needs of the minor in order to make a recommendation as to what the court should do to best serve the minor’s interests.

By design, a guardian ad litem “operate[s] outside the adversarial roles of other parties and act[s] as an advocate whose duties include investigation, presentation of both facts and available options for disposition, and overall protection of the child’s interests.” (*In re Charles T.* (2002) 102 Cal.App.4th 869, 877.) “CAPTA and the state statutes and rules designed to implement its requirements ensure that each child in a dependency matter will have a trained, independent guardian ad litem prepared to understand the child’s circumstances and make recommendations based on an evaluation of the child’s best interests.” (*Josiah Z., supra*, 36 Cal.4th at p. 680.)

B. Minor’s trial counsel.

1. Trial counsel’s role.

Trial counsel for the child plays a dual role of representing the wishes of the child and the child’s best interests. (*Celine R., supra*, 31

Cal.4th at p. 60; *Miguel S.*, *supra*, 134 Cal.App.4th at p. 768.) Welfare and Institutions Code section 317, subdivision (e)(1) states: “Counsel shall be charged in general with the representation of the child’s interests. To that end, counsel shall make or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts, including the interviewing of witnesses.”

In *In re David C.* (1984) 152 Cal.App.3d 1189, 1208, the court addressed the role of a minor’s counsel in a dependency proceeding. The court said, “[t]he role of counsel for the child is not merely to act as a mouthpiece for the minor. But neither is counsel to act as a mouthpiece for the government agency concerned. The whole purpose behind [the statute] is to provide *independent counsel*, when necessary, for the protection of the minor’s interests.” (*Ibid.*, emphasis in original.)

The *David C.* court suggested that “at a bare minimum, counsel for the minor should thoroughly review the record, interview the child when appropriate, consider such factors as health and age, and consider some type of contact with the child’s foster and natural parents in order to make an informed judgment on behalf of his client. Independent medical and psychological assessment might be necessary in appropriate cases. Only by such endeavor can the court be assured that counsel for the minor is truly independent and is informed enough to represent the child’s best interest.” (*David C.*, *supra*, 152 Cal.App.3d at p. 1208;)

Trial counsel for the child may advocate a position that is believed to be in the child’s best interests, even if it is contrary to the directions of the child. (See *In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1542-1543 [section 317 expressly provides “that the best interests of the minor, not his or her wishes, determine the outcome of the case”]; *In re Alexis W.* (1999)

71 Cal.App.4th 28, 36 [“counsel may not advocate a position he or she has reason to believe might endanger the child”]; *In re Candida S.* (1992) 7 Cal.App.4th 1240, 1253; *Kristen B., supra*, 163 Cal.App.4th at pp. 1542-1543;.) Trial counsel may “make recommendations to the court concerning the child’s welfare.” (Welf. & Inst. Code, § 317, subd. (e)(2).) And “[i]f the child is four years of age or older, counsel shall interview the child to determine the child’s wishes and assess the child’s well-being, and shall advise the court of the child’s wishes. Counsel shall not advocate for the return of the child if, to the best of his or her knowledge, return of the child conflicts with the protection and safety of the child.” (*Ibid.*)

Our Supreme Court has recognized, however, that with older children, “[a]t some point, notwithstanding their formal legal incompetence, children become capable of giving informed consent to key decisions affecting their circumstances.” (*Josiah Z., supra*, 36 Cal.4th at p. 682, fn. 7 [holding that the relevant age is a factual question, but that a four year old could not give informed consent].)

2. When must the juvenile court appoint counsel for the minor(s)?

Welfare and Institutions Code section 317 governs the appointment of counsel for minors and nonminor dependents.¹ Generally, the court must appoint counsel for the child if the child’s interests might conflict with Department’s or if the child would benefit from the appointment. (Welf. & Inst. Code, § 317; *In re Richard E.* (1978) 21 Cal.3d 349, 353-354; see *In re*

¹ A “nonminor dependent” is defined in Welfare and Institutions Code section 11400.

Mary C. (1995) 41 Cal.App.4th 71, 79.)

The child also has the right to conflict-free counsel. Multiple siblings can be represented by a single attorney, but there are rules for when separate counsel is necessary. (Cal. Rules of Ct., rule 5.660(c)(1); *Celine R.*, *supra*, 31 Cal.4th at p. 57.) At the outset of the case, the appointment of a separate attorney would be required “if, but only if, there is an actual conflict among the siblings or if circumstances specific to the case—not just the potential for conflict that inheres in all multisibling dependency cases—present a reasonable likelihood an actual conflict will arise.” (*Celine R.*, *supra*, 31 Cal.4th at p. 58.) “After the initial appointment, the court will have to relieve counsel from multiple representation if, but only if, an actual conflict arises.” (*Ibid.*) A conflict arises where minor’s counsel seeks a course of action for one child with adverse consequences to another. (*In re Barbara R.* (2006) 137 Cal.App.4th 941, 953.)

There is a need for separate counsel when siblings would not be kept together because in that scenario there is a reasonable likelihood of an actual conflict arising. (*Carroll v. Superior Court (San Diego Health and Human Services Agency)* (2002) 101 Cal.App.4th 1423, 1431). In contrast, the fact that siblings have different permanent plans does not necessarily demonstrate an actual conflict of interest. (See *In re T.C.* (2011) 191 Cal.App.4th 1387, 1390-1393 [no conflict of interest when only one of several siblings were to be adopted].) In *In re Zamer G.* (2007) 153 Cal.App.4th 1253, the court said there was no need to appoint separate counsel for the children even though some of the children wanted to be adopted and others did not because their trial counsel had determined it would be in their collective best interests to maintain one permanent plan. (*Id.* at pp. 1270-1271; see also *In re Richard H.* (1991) 234 Cal.App.3d

1351, 1368; *Candida S.*, *supra*, 7 Cal.App.4th at p. 1253.)

The court need not appoint new counsel if it would cause delay and the minors' interests are otherwise adequately protected. (*Celine R.*, *supra*, 31 Cal.4th at pp. 60-61.)

Note for Appellate Practitioners: The failure to appoint separate counsel for separate siblings is subject to the same harmless error standard as error in not appointing counsel for the children at all. (*Celine R.*, *supra*, 31 Cal.4th at p. 59.) "A court should set aside a judgment due to error in not appointing separate counsel for a child or relieving conflicted counsel only if it finds a reasonable probability the outcome would have been different but for the error." (*Id.* at p. 60.)

3. Representing non-minor dependents.

With non-minor dependents, trial counsel's duties are somewhat closer to any attorney's representation of an adult client. "When counsel is appointed to represent a nonminor dependent, counsel is charged with representing the wishes of the nonminor dependent except when advocating for those wishes conflicts with the protection or safety of the nonminor dependent. If the court finds that a nonminor dependent is not competent to direct counsel, the court shall appoint a guardian ad litem for the nonminor dependent." (Welf. & Inst. Code, § 317, subd. (e)(1).)

C. Due process right to the effective assistance of counsel.

A minor is entitled to competent counsel during dependency proceedings. (Welf. & Inst. Code, § 317.5; Cal. Rules of Court, rule 5.660(d); see also *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1666-1667

[discussing claims of ineffective assistance of counsel under principles of due process].) Although the Sixth Amendment does not apply in dependency proceedings (*In re Angel W.* (2001) 93 Cal.App.4th 1074, 1080), courts have found a due process right to competent counsel in dependency cases under the Fourteenth Amendment and the California Constitution, at least for parents when the parental rights are at stake and the issues are too complex for a parent to competently litigate alone. (U.S. Const, 14th Amend.; Cal. Const., art. I, § 7; *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 31-32; *Kristin H.*, *supra*, 46 Cal.App.4th at pp. 1666-1667; *In re Christina P.* (1985) 175 Cal.App.3d 115, 129.) An argument can thus be made that the child also has a due process right to competent counsel. In other contexts, courts have recognized that the child has a due process right to stability and permanency as well as a right to a continuing relationship with their parents. (See *In re Sade C.* (1996) 13 Cal.4th 952, 988; *In re Jasmon O.* (1994) 8 Cal.4th 398, 419.)

D. Standing.

It is not clear if a parent has standing to raise a claim of ineffective assistance of child's attorney, though courts have been hostile to the idea. (See, e.g., *In re S.A.* (2010) 182 Cal.App.4th 1128, 1134-1135.) If a parent can, it must be shown the parent suffered prejudice from child's counsel's deficient performance. (*Alexis W.*, *supra*, 71 Cal.App.4th at pp. 36-37.)

In the event that no guardian ad litem or attorney was appointed to represent the minor, it is also not clear if a parent has standing to complain. In *Charles T.*, *supra*, 102 Cal.App.4th at page 873, the Third Appellate District held that a parent did have standing "since lack of an independent

individual protecting and asserting the minor’s interests has an impact on the parent-child relationship at stake in dependency proceedings.” But compare this with the case of *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1000, where the parent did not have standing to challenge the court’s denial of appointment of guardian ad litem and counsel for her minor’s half-sibling. In any event, the claim will be forfeited without an objection by the parent below. (*Charles T.*, *supra*, 102 Cal.App.4th at p. 873.)

III. Appellate Counsel for the Minor.

How do the duties of appellate counsel differ from those of trial counsel in the representation of minors? While the expectations for counsel outlined in Welfare and Institutions Code section 317 apply only to the proceedings in the juvenile court (*Zeth S.*, *supra*, 31 Cal.4th at pp. 409, 414-415), those requirements can be useful for appellate counsel who represent minors. There are some important differences, however.

First, the appointment of appellate counsel is only required if the minor is also the appellant. (Welf. & Inst. Code, § 395, subd. (b)(1).) The court has no obligation to appoint counsel for the child on appeal. (*Zeth S.*, *supra*, 31 Cal.4th at pp. 409, 414-415.) An appointment is made at the discretion of the appellate court upon the request of child’s trial counsel or, if none, the CASA worker. (Welf. & Inst. Code, § 395, subd. (b);² Cal.

² Welfare and Institutions Code section 395, subdivision (b)(1), provides in relevant part: “In any appellate proceeding in which the child is an appellant, the court of appeal shall appoint separate counsel for the child. If the child is not an appellant, the court of appeal shall appoint separate counsel for the child if the court of appeal determines, after considering the recommendation of the trial counsel or guardian ad litem appointed for the child pursuant to subdivision (e) of Section 317, Section 326.5, and California

Rules of Court, rule 5.661 [listing the procedure and timing for requesting appellate counsel for minors who are not the appellant].)

Second, appellate counsel for the child does not have the same authority to act in the child's best interests. In *Josiah Z.*, the Supreme Court extended to the appellate process the CAPTA requirement that a minor have a guardian ad litem. (*Josiah Z.*, *supra*, 36 Cal.4th at p. 680.) "Because a child involved in an appeal from a dependency proceeding order is still the subject of the juvenile dependency petition, CAPTA imposes on state courts a continuing obligation to ensure that each child has a CAPTA guardian ad litem on appeal." (*Ibid.*) The CAPTA guardian ad litem is not appellate counsel, but instead will be minor's trial counsel or, if not, the CASA worker. What this means for appointed appellate counsel is the duty to identify the guardian ad litem as early as possible in the appeal and to communicate with them as to what they consider to be the best interests of the minor-client. Keep in mind that it is often, but not always, the minor's trial attorney. In matters that require the client's authority, such as moving to dismiss an appeal, appellate counsel cannot act without approval of the guardian ad litem. (*Id.* at pp. 687-688.)

Rule of Court 5.662, that appointment of counsel would benefit the child. In order to assist the court of appeal in making its determination under this subdivision, the trial counsel or guardian ad litem shall make a recommendation to the court of appeal that separate counsel be appointed in any case in which the trial counsel or guardian ad litem determines that, for the purposes of the appeal, the child's best interests cannot be protected without the appointment of separate counsel, and shall set forth the reasons why the appointment is in the child's best interests. The court of appeal shall consider that recommendation when determining whether the child would benefit from the appointment of counsel."

Note for Appellate Practitioners: It is strongly recommended that appellate counsel contact their project buddy to discuss the case whenever a contrary position is considered. Appellate counsel must also obtain authorization from the minor’s guardian ad litem before taking a position on appeal contrary to the position of the guardian ad litem’s in the trial court.

C. Communicating with a minor client.

Appellate Practitioner Tip: As a starting point, it is worth connecting with the minor’s trial counsel and/or guardian ad litem to find out how they would suggest you communicate with your client. Since they are usually closer to the client, their insight can be invaluable.

Appellate counsel has a duty to communicate with their client, ascertain the needs and wishes of their client, and keep their client informed of major developments in the case. (Bus. & Prof. Code, § 6068, subd. (m); Rules of Prof. Cond., rule 1.4(a)(3); *Strickland v. Washington* (1984) 466 U.S. 668, 688.) Counsel also has a duty to make reasonable investigations into the case. (*Strickland, supra*, 466 U.S. at p. 691.)

Keep in mind that communicating with a minor client will likely differ from how you might communicate with an adult client. Reaching out to the minor’s trial counsel and/or guardian ad litem should be a first step to help figure out the best communication method. This is especially true with younger children who are often too young to understand legalese or indeed too young to communicate at all. The minor’s foster parents and any CASA worker could also be a good resource of information about communicating with the minor.

When deciding how best to communicate with your client, consider your minor client’s age and what would be considered an age-appropriate

method of communication and age-appropriate content. In most cases, the language used needs to be simpler. In many instances, the best communication method may be verbal. This can include telephone calls and, if necessary, visiting the child. If the communication is by letter, a short letter may be all that a child can understand. Many older children communicate by texts or social media, and this might be an effective method of communicating with the child so long as the communication will remain confidential.

In the unusual case where interviewing the minor is required, special precautions should be taken. To set up an interview with the minor, counsel should go through the minor's trial counsel or social worker. Counsel may also contact the minor's foster parents, and/or siblings to assess the home situation. Keep in mind, however, that the interests of the minor client may not be aligned with the interests of the foster parent and/or siblings, and so communications should be limited to only necessary and non-confidential matters. If any are represented by an attorney, appellate counsel must obtain permission from that attorney before contacting them. To speak to the minor's siblings, counsel need only obtain the (foster) parents' permission, unless the siblings are also represented by counsel.

Appellate counsel can seek funds for investigation, including seeing the child, if there is good cause. (*Josiah Z.*, *supra*, 36 Cal.4th at p. 684.) Appellate counsel should check with their project buddy to learn what the procedure is in the appropriate appellate district.