

## **APPOINTMENT OF COUNSEL FOR MINOR ON APPEAL**

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**Welfare and Institutions Code section 317**, as amended in 2000, provides in relevant part:

“(c) Where a child is not represented by counsel, the court shall appoint counsel for the child unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding. A primary responsibility of any counsel appointed to represent a child pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child. Counsel for the child may be a district attorney, public defender, or other member of the bar, provided that the counsel does not represent another party or county agency whose interests conflict with the child's. The fact that the district attorney represents the child in a proceeding pursuant to Section 300 as well as conducts a criminal investigation or files a criminal complaint or information arising from the same or reasonably related set of facts as the proceeding pursuant to Section 300 is not in and of itself a conflict of interest. . . . The Judicial Council shall promulgate rules of court that establish caseload standards, training requirements, and guidelines for appointed counsel for children and shall adopt rules as required by Section 326.5 no later than July 1, 2001.”

**California Rule of Court 1412** (g) and (h) provide in relevant part: “At each

hearing the court shall advise an unrepresented child, parent, or guardian of the right to be represented by counsel, and, if applicable, of the right to have counsel appointed. . . . [¶]

(1) In cases petitioned under section 300: [¶] (A) The court shall appoint counsel for the child if it appears that the child would benefit from the appointment.” (See also **Welf. & Inst. Code §§ 633, 634, 700.**)

Up to now, appointment of counsel for the minor in the court of appeal has been considered a discretionary matter, with at least one court taking the position in a published case that if the minor had separate counsel in the trial court, the minor may, depending on circumstances, have a right to her or his own attorney on appeal. (*In re Mary C.*(1995) 41 Cal.App.4th 71, 41 Cal.App.4th 1523C, as modified.[2d District].) It remains to be seen whether, in light of the 2000 amendments, the Judicial Council will promulgate rules which continue to view appointment of counsel for the minor as purely a matter of discretion, rather than right, at least in the absence of a finding that counsel would be of no benefit to the child. At present, the different courts of appeal do not have a uniform policy on the issue.

In the **First District**, counsel for the minor is likely to be appointed if, broadly speaking, the child’s preference or interest is not adequately represented by any party to the appeal. There are several recognized circumstances which can and often do give rise to the appointment of counsel on appeal for the minor under this broad umbrella. The

first is to forestall the *Elise K.*<sup>1</sup> situation where the child has been found adoptable, and parental rights have been terminated, but the adoption placement has already fallen through or is likely to do so, and there is no counsel to bring the facts to the Court of Appeal's attention. Appointment of counsel for the minor is also likely where a minute order shows the adoption has fallen through or other articulable facts demonstrate that the adoption is likely to fall through. For example, such facts might be that, despite a finding of adoptability, no adoption is actually likely to occur because no specific adoptive family was identified and the child has significant problems that make him difficult to adopt. Another situation in which counsel is likely to be appointed for the minor is where siblings have been separately placed, but the record shows the children have formed a substantial sibling bond. Appointment of counsel for the minor is also likely if the child is twelve or older, and he or she was never asked to express a preference regarding his or her disposition in the trial court.

In the **Third and Fifth Districts**, there is no stated policy on appointment of counsel for the minor, and appointment is considered on a case-by-case basis. Situations which are likely to result in the appointment of counsel --if CCAP, or appellate counsel or trial counsel bring them to the attention of the court -- include those where older children are involved, social workers have taken contradictory positions or positions adverse to the child's, the county has acted contrary to the child's expressed wishes, or siblings have an

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<sup>1</sup> *In re Elise K.* (1982) 33 Cal.3d 138 .

interest in maintaining the sibling bond, or have antagonistic interests.

In the **Sixth District**, the Court assumes that minor's trial counsel continues to represent the minor on appeal. The District Attorney almost always represents the minor in the trial court. On appeal, the District Attorney sometimes writes briefs and sometimes join in another party's brief, but most often is silent. Occasionally, private counsel is appointed to represent a child in the trial court. If trial counsel informs the court in writing that he or she cannot represent the minor on appeal, and asks that counsel be appointed, the Court will appoint separate counsel for the minor on appeal.