

Representing Minors in Dependency Appeals

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Introduction:

This article sets forth CCAP policies regarding the representation of minors in dependency appeals in the Third and Fifth District Court of Appeal following major decisions by the California Supreme Court which affect this area of appellate practice. Because the expectations and duties of counsel representing a minor are somewhat greater than those for counsel representing other parties in dependency appeals, CCAP does anticipate that minor's counsel may spend more time in these cases, and to the extent that additional time is required, it will be compensable. It is always a good practice to consult first with a CCAP staff attorney before embarking on any type of investigation which will cause expenses out of the ordinary. As with any other case, any claim for travel must be preapproved.

Sources That Impact the Role of Minor's Counsel:

Statutory law, case law, and ethical codes all impact the role that minor's counsel plays in dependency appeals. The challenge in representing a minor comes in determining how to guard against or reconcile the conflicts which arise between the statutes, the case law, and the ethical codes. Recent case law has resolved some of the conflicts. *In re Zeth S.* (2003) 31 Cal.4th 396 held that although the appellate court may appoint separate counsel for a minor in an appeal from an order terminating parental rights, Welfare and Institutions Code section 317 does not regulate the duties and obligations of appointed counsel in dependency appeals. The *Zeth S.* Court also held that the statutory scheme does not authorize a reviewing court to substitute its own judgment as to what is in the child's best interests for the trial court's determination in that regard. The Court found this particularly true where the reviewing court reaches a contrary determination on the basis of postjudgment evidence outside the record on appeal. Hence, it is the unusual case where postjudgment investigation of the minor's current circumstances will be necessary.

Then, in *In re Josiah Z.* (2005) 36 Cal.4th 664, the California Supreme Court further defined the role of appellate counsel in dependency appeals by looking to ethical rules, general juvenile court policies, and the specific terms of section 317 for guidance. In its opinion, the Court held that (1) appellate counsel has the power to seek dismissal of a child's dependency appeal based on the child's best interests, and the Court of Appeal has the power to consider and rule on such a motion, (2) appellate counsel may seek funds to meet personally with the client to

investigate a potential motion, but (3) appellate counsel may actually file a motion to dismiss the appeal only after consultation with and authorization from the child or the child's guardian ad litem.

The Court rejected the argument made in *Josiah Z.* that appellate counsel steps in to the role of CAPTA GAL/attorney in the absence of a formal appointment by the appellate court. (The federal Child Abuse Prevention and Treatment Act (CAPTA) [42 U.S.C. sec. 5101 et seq.] authorizes federal funding for state specially trained guardian ad litem (GAL) in every judicial proceeding involving an abused or neglected child.) On the contrary, trial counsel's role does not terminate at the filing of a notice of appeal, and the appellate court does not have to appoint or re-appoint the CAPTA GAL. The Court allowed that appellate counsel may seek funds to independently investigate, but must weigh the cost of delay in the proceedings resulting against the need for additional information in light of the already available evidence and the position of the CAPTA GAL. Where the CAPTA GAL is against dismissal of the appeal, funding will be rarely be granted. On the other hand, if the CAPTA GAL is uncertain, it may be appropriate for counsel to seek funds to allow further investigation.

Given the opinions in *Zeth S.* and *Josiah Z.*, does appellate counsel for the minor in a dependency case have a duty to investigate the minor's current situation?

Appellate counsel should not automatically take the same position on appeal as was taken at trial. If appellate counsel believes circumstances have changed significantly, altering the position taken may be indicated. For example, where counsel discovers that a minor who was found specifically adoptable because of a particular placement has become a "legal orphan" due to the failure of that placement, the appellate court may be willing to consider postjudgment evidence. Or, where significant time has passed since the minor's placement, and the appeal challenges that placement, it may be necessary to determine whether a change in placement many months later is in the minor's best interests. In any event, appellate counsel should thoroughly discuss the matter with trial counsel, attempting to obtain consensus. The CCAP buddy attorney is available for consultation where agreement cannot be reached.

Since trial counsel maintains a continuing role following the filing of a notice of appeal, appellate should first contact trial counsel for information regarding the current circumstances before embarking on an independent investigation. Trial counsel may be in the best position to determine whether a change in

circumstances affecting the appeal has occurred. 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 biological parents, foster parents, and siblings to assess the home situation. If the parents are represented by counsel, appellate counsel must obtain permission from their attorneys before speaking to the parents. To speak to the minor's siblings, counsel need only obtain the parents' permission, unless the siblings are also represented by counsel. Other parties who may be contacted include the minor's social worker and the minor's therapist; appellate counsel may contact these parties directly.

In summary, despite the apparent narrowing of appellate counsel's role in the representation of minor clients, counsel is still charged in general with the representation of the child's best interests.

Compensation Considerations:

Compensation for travel to see the minor may be obtained in an appropriate case after consultation with trial counsel. In the Fifth District, the application is made directly to the court. In the Third District, CCAP is delegated the approval authority for up to \$600. (See Travel & Preauthorization Procedures on the CCAP website.) In either case, the application should comply with the dictates of *Josiah Z.* as described in this article.