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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JOSIAH Z., et al., Persons Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. JOSIAH Z., et al., Appellants.	F044121 (Super. Ct. Nos. JD097344 & JD097345 **O P I N I O N**

APPEAL from a judgment of the Superior Court of Kern County. Peter A. Warmerdam, Juvenile Court Referee.

Marin Williamson, under appointment by the Court of Appeal, for Appellants.

Michelle R. Trujillo, under appointment by the Superior Court, for Appellants.

B.C. Barmann, Sr., County Counsel, and Jennifer L. Thurston, Deputy County Counsel, for Plaintiff and Respondent.

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At issue before this court is a preliminary question in an appeal brought by trial counsel for two dependent children, ages four and one. The question is whether the children's appellate counsel has the authority to dismiss their appeal based on her analysis of their best interests. On review, we hold appellate counsel has no such authority.

FACTUAL AND PROCEDURAL HISTORY

In August 2002, the Kern County Superior Court adjudged two-year-old Josiah and infant Gabriel dependent children of the court and removed them from parental custody. The court previously determined the children came within its jurisdiction under Welfare and Institutions Code section 300, subdivision (b) after Gabriel tested positive for drugs at birth.[1] Not only were the children at substantial risk of physical harm or illness due to their mother's drug abuse, their father had been physically abusive of their mother.

After both parents failed to reunify with their sons, the court in July 2003 terminated reunification services and set a section 366.26 hearing. Having made its setting order, the court then granted a request by the childrens' attorney for a hearing on relative placement. The paternal grandparents previously requested placement of the children in their home, but their request was denied. Claiming she did not know the reason for the denial, children's trial attorney claimed a right to a hearing on the issue.

The court conducted the evidentiary hearing in September 2003. Respondent Kern County Department of Human Services (the department) made a showing that each of the paternal grandparents had a criminal record and the paternal grandmother's own children had been juvenile dependents due to her neglect. Further, the placement worker for the department and later her supervisor denied the paternal grandparents' 2002 requests for an exemption (§ 316.4). The court found the department did not abuse its discretion in

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[1] All statutory reference are to the Welfare and Institutions Code.

denying the paternal grandparents placement. It then separately considered and denied the paternal grandparents' current request for placement. Trial counsel for the children appealed on her clients' behalf.

DISCUSSION

As is our practice, we appointed new counsel through the Central California Appellate Program (CCAP) to represent the children as appellants before this court. Soon thereafter, appellate counsel requested travel funds to visit her young clients and assess their current situation and wishes. She explained that, in her professional opinion, it was not in the children's best interest to pursue the appeal and if, after visiting the children, she still believed dismissal of the appeal was in their best interest, she would move to dismiss the appeal. We in turn ordered briefing on appellate counsel's authority to dismiss her minor clients' appeal based on her analysis of their best interests. On review, appellate counsel fails to cite and our own independent research does not reveal any persuasive, let alone binding, authority to support her position.

In her original request to this court, appellate counsel claimed a duty to take a fully independent, informed position in representing the minors on appeal and to obtain input from all necessary sources. She cited language from this court's opinion in *In re David C.* (1984) 152 Cal.App.3d 1189 (*David C.*) as well as a portion of the "CCAP Panel Attorney Manual" (CCAP manual) which references *David C.*

David C. was a parents' appeal from an order terminating parental rights under former Civil Code section 232. (*In re David C., supra,* 152 Cal.App.3d at p. 1194.) In part, the parents claimed their child's court-appointed trial counsel was ineffective. This court did not speak to the ineffectiveness claim given that we were reversing the judgment on alternative grounds. Nevertheless, we did address "the proper role of an attorney appointed to represent a minor in a [former Civil Code] section 232 or other custody proceeding." (*In re David C., supra,* 152 Cal.App.3d at p. 1207.) At the time, former Civil Code section 237.5 gave the juvenile court the discretion to appoint counsel

for a minor when "the interests of the minor" required such appointment. This court observed:

> "The role of counsel for the child is not merely to act as a mouthpiece for the minor child. But neither is counsel to act as a mouthpiece for the governmental agency concerned. The whole purpose behind section 237.5 is to provide *independent counsel*, when necessary, for the protection of the minor's interests. We suggest, at a bare minimum, counsel for the minor should thoroughly review the record, interview the child when appropriate, considering 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 interests." (*In re David C., supra,* 152 Cal.App.3d at p. 1208.)

It was this portion of *David C.* which appellate counsel cited as authority to independently evaluate her young clients' best interests. However, in doing so she took this court's words out of context. As noted above, the issue we addressed was the proper role of an attorney appointed to represent a minor in a former Civil Code section 232 or other custody proceeding. Furthermore, the counsel to whom we referred was trial, not appellate, counsel. Even accepting the notion that a minor's appellate counsel has a duty to take a fully independent, informed position in representing the minor on appeal, our words do not stand for the proposition that it is also appellate counsel's duty to independently evaluate her young clients' best interests and decide whether to pursue the appeal based on that evaluation.

Appellate counsel's subsequent briefing effort remains unpersuasive. To begin, the Legislature has not spelled out the duties of appellate counsel appointed to represent children in dependency appeals. By contrast, section 317, subdivision (e) outlines the duties of trial counsel appointed to represent children in dependency proceedings. It provides:

> "The counsel for the child shall be charged in general with the representation of the child's interests. To that end, the 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, and he or she shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings. He or she may also introduce and examine his or her own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child. In any case in which the child is four years of age or older, counsel shall interview the child to determine the child's wishes and to assess the child's well-being, and shall advise the court of the child's wishes. Counsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child. In addition counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings. The attorney representing a child in a dependency proceeding is not required to assume the responsibilities of a social worker and is not expected to provide nonlegal services to the child. The court shall take whatever appropriate action is necessary to fully protect the interests of the child." (§ 317, subd. (e).)

Our Supreme Court has specifically ruled that the Legislature did not intend the provisions of section 317 to apply to counsel appointed for children in dependency appeals. (*In re Zeth S.* (2003) 31 Cal.4th 396, 415 (*Zeth S.*).) *Zeth S.* arose out of one appellate court's willingness to receive and consider post-judgment evidence particularly from a child's appointed appellate counsel and rely on such evidence, which was outside the record on appeal, to reverse a judgment terminating parental rights. (*Id.* at p. 400.) As the Supreme Court explained, the appellate court decision in *Zeth S.* was not the first time that the appellate court (Div. 3 of the 4th Dist. Ct.App.) addressed the relevance and admissibility of postjudgment evidence in a juvenile dependency appeal.

> "[There were] four other published decisions authored by the court, each seemingly intended to further advance the court's belief that postjudgment evidence will often be relevant in an appeal of an order terminating parental rights and freeing a dependent child for adoption, that counsel appointed for the minor on appeal is obligated by statute to independently investigate the

> child's current out-of-home placement and bring any evidence of changed circumstances to the attention of the reviewing court, and that such evidence should be liberally received and considered by the reviewing court for its potential impact on the appeal from the juvenile court's termination order entered at the 366.26 hearing." (*In re Zeth S., supra*, 31 Cal.4th at p. 407.)

One of the four decisions cited was *In re Eileen A.* (2000) 84 Cal.App.4th 1248 (*Eileen A.*), a case upon which appellate counsel now relies. As the Supreme Court briefly summarized, the *Eileen A.* court held

> "a dependent child's appointed appellate counsel, like the child's trial counsel in the juvenile court, has a 'duty to make an independent evaluation based on the circumstances in each case,' that 'evidence as to how well the child is doing in a placement during the pendency of the appeal may be taken into account by the appellate court,' and that 'it is especially important that independent minor's appellate counsel evaluate what is in the best interests of their clients without any presumptions.' (*Id.* at p. 1262, fn. 13.)" (*In re Zeth S., supra,* 31 Cal.4th at p. 407.)

Appellate counsel cites the quoted language from *Eileen A.* for the proposition that she must make an independent judgment about the children's best interests. We question however her reliance on *Eileen A., supra*.

First, the Supreme Court rejected the appellate court's consideration of postjudgment evidence and its liberal use of such evidence to reverse juvenile court judgments. (*In re Zeth S., supra,* 31 Cal.4th at p. 413.) In so doing, the court was also critical of the appellate court's reasoning that appellate counsel for the child was obligated by statute to independently investigate the child's current out-of-home placement and bring any evidence of changed circumstances to the attention of the reviewing court. The court stated:

> "Although we have no doubt the Court of Appeal had the best interests of the minors in mind when it decided this and the related cases, the court's rationale and holdings are nonetheless well outside the legal mainstream, and cannot be squared with the general rules on appeal and specific statutory provisions that govern juvenile dependency appeals." (*In re Zeth S., supra*, 31 Cal.4th at pp. 407-408.)

Later, in its criticism of the appellate court's expansive view of the scope of its review, the Supreme Court pointed out that under the appellate court's approach,

> "[a]ppointed counsel for the minor in the appeal would be encouraged, and indeed obligated, to independently investigate such evidence outside the record, and bring it to the reviewing court's attention for consideration in the appeal." (*Id.* at p. 412.)

In rejecting the appellate court's consideration of postjudgment evidence and its liberal use of such evidence to reverse juvenile court judgments, the Supreme Court also disapproved the four other decisions from the same appellate court, including *Eileen A.,* "to the extent anything said in [those decisions] is inconsistent with the views expressed herein." (*In re Zeth S., supra,* 31 Cal.4th at p. 413.)[2]

Thus, as we read the Supreme Court's *Zeth S.* opinion*,* we are persuaded that the *Eileen A*. rule - that a child's appellate counsel must independently evaluate what is in the best interests of his or her client - is of questionable precedential value, if not outright disapproved by the Supreme Court in *Zeth S.* (*In re Zeth S., supra,* 31 Cal.4th at p. 413.)

Alternatively, we find *Eileen A.* unpersuasive because the appellate court cited no authority for its expansive statements about the duty of the minor's appellate counsel. To the extent the Fourth District, Division 3 later expanded its *Eileen A.* view of the role of minor's appointed appellate counsel in its *Zeth S.* opinion and *In re Jayson T., supra,* by holding that section 317 applied by implication to minors' appointed appellate counsel, we note, as previously mentioned, the Supreme Court in *Zeth S.* specifically held the Legislature did not intend the provisions of section 317 to apply to counsel appointed for minors in dependency appeals. (*In re Zeth S., supra,* 31 Cal.4th at p. 415.)

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[2] The other decisions, in addition to *In re Eileen A., supra,* were *In re Jonathan M.* (1997) 53 Cal.App.4th 1234, *In re Jeremy S.* (2001) 89 Cal.App.4th 514, and *In re Jayson T.* (2002) 97 Cal.App.4th 75.

The remainder of appellate counsel's claim of authority to dismiss her minor clients' appeal based on her analysis of their best interests is little more than boot-strapping.

For example, she cites California Rules of Court, rules 30.3 and 39(a) for the proposition that an appellant may abandon an appeal at any time by filing an abandonment signed by appellant or appellant's attorney of record.[3] However, the availability of this appellate procedure does not settle the question of whether appellate counsel has the authority to evaluate her clients' best interests.

Appellate counsel also urges she has an affirmative duty to seek dismissal because she has a legal and ethical duty (Bus. & Prof. Code, § 6068, subd. (c); Rules of Prof. Conduct, rule 3-200) to maintain only such actions as appear to her legal or just, and for which she can present a claim supported by a good faith argument. In making this argument, she relies on the well-settled proposition that dependency proceedings are conducted with the goal of serving the minor's best interests. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306-307.) From her perspective, a proceeding that does not serve a child's best interests is unlawful. Her argument nevertheless begs the question of what authority she has in the first instance to determine the children's best interests.

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[3] California Rules of Court, rule 30.3 and 39(a) respectively state in relevant part to counsel's claim as follows:

> "An appellant may abandon the appeal at any time by filing an abandonment of the appeal signed by the appellant or the appellant's attorney of record" (Cal. Rules of Court, rule 30.3(a)); and
>
> "The rules governing appeals from the superior court in criminal cases are applicable to all appeals from the juvenile court and any appeal in an action under part 4 (commencing with section 7800) of division 12 of the Family Code, except where otherwise expressly provided by this rule or rule 39.1, 39.1A, or 39.1B, or where the application of a particular rule would be clearly impracticable or inappropriate." (Cal. Rules of Court, rule 39(a).)

Finally, oral argument on this issue exposed yet another problem with appellate counsel's claim, that is, what would the procedure be? Appellate counsel urged that as part of a motion to dismiss, she could file with this court and serve on the other counsel a declaration disclosing her best interests analysis to which opposing counsel could respond. Once again, she cites no persuasive authority for her suggested procedure. Moreover, it would violate existing law in two ways. One, it would improperly inject post-judgment evidence into an appeal (*In re Zeth S., supra,* 31 Cal.4th at p. 413). Two, it would cause this court to exceed its authority as a court of review (*id.* at p. 405), by putting this court in the position of being a trier of fact, evaluating the children's best interests.

The *Zeth S.* court observed:

> "The Legislature, however, has determined that what is in the child's best interests is best realized through implementation of the procedures, presumptions, and timelines written into the dependency statutes." (*In re Zeth S., supra,* 31 Cal.4th at p. 410.)

Appellate counsel's suggested procedure, not to mention her claimed right to independently evaluate her minor clients' best interests, in effect flies in the face of those checks and balances and leaves her young clients with no recourse, their right of appeal having been abandoned. Although we have no doubt as to appellate counsel's good faith best intentions in this matter, we cannot condone her proposal.

In the absence of any statutory or case law supporting her claim of authority to dismiss her clients' appeal, this court must deny counsel's request. As a matter of legal practice, we note if a child's appellate counsel after reviewing the record and the law does not believe in good faith that an argument for reversal can be made, that attorney should serve the equivalent of a *Sade C.* brief upon this court, respondent, and trial counsel for the child.[4] In turn, this court will authorize trial counsel for the child to file a

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[4] *In re Sade C.* (1996) 13 Cal.4th 952.

letter brief explaining why he or she believed the juvenile court committed prejudicial error. If trial counsel can show arguable error, we will order supplemental briefing and thereafter review the merits.

Under all of these circumstances, we hold appellate counsel for a dependent child does not have the authority to dismiss the child's appeal based on appellate counsel's assessment of the child's best interests.

DISPOSITION

The request for travel funds is denied. All other pending motions are denied. Appellant's opening brief shall be due for filing within 30 days of the date of this opinion.

WE CONCUR:

_____
Ardaiz, P.J.

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Vartabedian, J.

_____
Cornell, J.