

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT

SPR11-37

Title	Action Requested
Family Law: Counsel Appointed to Represent a Child in Family Law Proceedings	Review and submit comments by June 20, 2011
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend rule 5.242 of the California Rules of Court, revise form FL-323, and approve form FL-321-INFO	January 1, 2012
Proposed by	Contact
Family and Juvenile Law Advisory Committee Hon. Kimberly Nystrom-Geist and Hon. Dean Stout, Cochairs	Gabrielle D. Selden, 415-865-8085 gabrielle.selden@jud.ca.gov

Discussion

Effective January 1, 2011, Assembly Bill 939 (Assem. Com. on Judiciary; Stats. 2010, ch. 352) amended Family Code section 3151 regarding the responsibilities of counsel appointed in family law cases to represent a child. The statute authorizes counsel to present the child's wishes to the court, if the child so desires. It also requires that counsel serve notices and pleadings on all parties consistent with what is required of parties.

The bill also amended Family Code section 3151 to clarify that counsel's other duties include presenting admissible evidence to the court in the manner appropriate for the counsel of a party and ascertaining evidence relevant to the custody or visitation hearing. In addition, AB 939 removed the provisions of Family Code section 3151 relating to the duty of appointed counsel to prepare a written statement of issues and contentions about the best interests of the child in the case.

To implement these statutory changes, the Family and Juvenile Law Advisory Committee recommends that rule 5.242 of the California Rules of Court be amended and that *Order Appointing Counsel For A Child* (form FL-323) be revised effective January 1, 2012, as proposed in the attached documents. Other proposed changes to the form include providing additional space at item 8 for the court to make additional orders relating to the appointment and

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

amending item 9 to clarify that counsel's appointment to represent the child will continue until terminated as provided in rule 5.240(f).

In addition, the committee proposes that the Judicial Council approve a new optional form, *Minor's Counsel (Attorney for Child in Family Law Case)* (form FL-321-INFO). This form would help respond to questions that parties in family law cases frequently ask about costs, duties, and the role that minor's counsel might play in their case. The statewide form would provide much needed information and consistency in the provision of information about minor's counsel throughout the state.

The proposed amended rule and revised and new forms are attached at pages 3–8. Family Code section 3151 is attached at page 9.

Rule 5.242 of the California Rules of Court would be amended, effective January 1, 2012, to read:

1 **Rule 5.242. Qualifications, rights, and responsibilities of counsel appointed to**
2 **represent a child in family law proceedings**

3
4 **(a)—(i) *****

5
6 **(j) Responsibilities of counsel for a child**

7
8 Counsel is charged with the representation of the ~~best interest of the child's~~ best
9 interests. The role of the child's counsel is to gather ~~facts~~ evidence that bears on the
10 best interest of the child, and present ~~those facts~~ admissible evidence to the court
11 ~~including the child's wishes when counsel deems it appropriate for consideration~~
12 ~~by the court under Family Code section 3042.~~ in the same manner as counsel for a
13 party. If the child so desires, the child's counsel must present the child's wishes to
14 the court. The ~~C~~counsel's duties, unless under the circumstances it is inappropriate
15 to exercise the duties, include those under Family Code section 3151.;

16
17 (1) ~~Interviewing the child;~~

18
19 (2) ~~Reviewing the court files and all accessible relevant records available to both~~
20 ~~parties;~~

21
22 (3) ~~Making any further investigations that counsel considers necessary to~~
23 ~~ascertain the facts relevant to the custody or visitation hearings;~~

24
25 (4) ~~Participating in the proceeding to the degree necessary to adequately~~
26 ~~represent the child, including introducing and examining counsel's own~~
27 ~~witnesses and presenting arguments to the court concerning the child's~~
28 ~~welfare; and~~

29
30 (5) ~~Preparing, at the court's request, a written statement of issues and contentions~~
31 ~~setting forth the facts that bear on the best interest of the child.~~

32
33 **(k) *****

<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</p> <p>STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:</p>	<p><i>FOR COURT USE ONLY</i></p> <p style="font-size: 1.2em; font-weight: bold;">Draft Not approved by the Judicial Council</p>
<p>PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARTY:</p>	
<p>ORDER APPOINTING COUNSEL FOR A CHILD</p>	<p>CASE NUMBER:</p>

1. The proceeding was heard:

On *(date)*: _____ at *(time)*: _____ in Dept.: _____ Room: _____
 Judge *(name)*: _____ Temporary Judge

Petitioner/Plaintiff present Attorney present *(name)*: _____
 Respondent/Defendant present Attorney present *(name)*: _____
 Other present Attorney present *(name)*: _____
 On the order to show cause or motion filed *(date)*: _____ by *(name)*: _____

THE COURT FINDS it is in the best interest of the child to appoint counsel to represent the child under Family Code section 3150(a).

<p>Counsel appointed for the child <i>(name of counsel)</i>:</p> <p>Address:</p> <p>Phone number: _____ E-mail address <i>(optional)</i>: _____</p>

2. CHILD OR CHILDREN FOR WHOM COUNSEL IS APPOINTED

<u>Name</u>	<u>Date of birth</u>	<u>Address <i>(if appropriate)</i></u>
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3. REASON FOR APPOINTMENT *(specify)*:

4. COUNSEL FOR A CHILD IS CHARGED WITH THE FOLLOWING RESPONSIBILITIES:

- a. Representing the child's best interests.
- b. Gathering evidence that bears on the best interest of the child, and presenting admissible evidence to the court in the same manner as counsel for a party.
- c. If the child so desires, presenting the child's wishes to the court;
- d. Interviewing the child;
- e. Reviewing the court files and all accessible relevant records available to both parties;
- f. Making any further investigations child's counsel considers necessary to ascertain evidence relevant to the custody or visitation hearing;
- g. Participating in the proceedings to the degree necessary to adequately represent the child, including introducing and examining counsel's own witnesses and presenting arguments to the court concerning the child's welfare; and
- h. Serving notices and pleadings on all parties consistent with what is required for parties.

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARTY:	CASE NUMBER:
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5. COUNSEL FOR A CHILD HAS THE FOLLOWING RIGHTS:

- a. Reasonable access to the child;
- b. Standing to seek affirmative relief on behalf of the child;
- c. Notice of any proceeding, and all phases of that proceeding, including a request for examination affecting the child;
- d. To be heard in the proceeding and take any action available to a party in the proceeding;
- e. Access to the child's medical, dental, mental health, and other health-care records;
- f. Access to the child's school and educational records;
- g. To interview school personnel, caretakers, health-care providers, mental health professionals, and others who have assessed the child or provided care to the child;
- h. To interview mediators subject to the provisions of Family Code sections 3177 and 3182;
- i. To assert or waive any privilege on behalf of the child;
- j. To reasonable advance notice of and the right to refuse any physical or psychological examination or evaluation, for purposes of the proceeding, that has not been ordered by the court;
- k. On approval of the court, to seek independent psychological or physical examination or evaluation of the child for purposes of the pending proceeding;
- l. On noticed motion to all parties and the local child protective services agency, to request the court to authorize release of relevant reports or files concerning the child represented by the counsel of the relevant local child protective services agency as provided by Family Code section 3152; and
- m. Not to be called as a witness in the proceeding. (Fam. Code, §§ 3151(b) and 3151.5).

6. DETERMINATION OF FEES AND PAYMENT

- a. Counsel for the child will be compensated as follows:
 - (1) *(Specify amount or rate and terms):*
 - (2) The court reserves jurisdiction to determine compensation payable to counsel for the child.
 - (3) The court reserves jurisdiction to retroactively modify the compensation payable to counsel for the child.
- b. The court finds that the parties are able to pay the compensation and expenses for the child's counsel. The parties are ordered to pay counsel for the child as follows:
 - (1) % Petitioner/Plaintiff % Respondent/Defendant
 - Petitioner/Plaintiff must make installment payments of \$ _____ per month until paid or modified by court order.
 - Respondent/Defendant must make installment payments of \$ _____ per month until paid or modified by court order.
 - (2) The court reserves jurisdiction to reallocate attorney's fees and costs between the parties.
- c. The court finds that both parties are unable to pay all a portion of the costs for the minor child's counsel. Minors' counsel must be paid as follows:
 - (1) The court will pay all the fees and expenses for the child's attorney.
 - (2) % Petitioner/Plaintiff % Respondent/Defendant % Payable by the court.
 - Petitioner/Plaintiff must make installment payments of \$ _____ per month until paid or modified by court order.
 - Respondent/Defendant must make installment payments of \$ _____ per month until paid or modified by court order.
 - (3) The court reserves jurisdiction to reallocate attorney's fees and costs between the parties.
 - (4) The court may seek reimbursement from the parties if the court pays all or a portion of the compensation for the child's counsel.
- d. Other:

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARTY:	CASE NUMBER:
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NOTICE

Any party required to pay court-ordered attorney's fees or reimburse the court for attorney's fees paid on a party's behalf must pay interest on overdue amounts at the legal rate, which is currently 10 percent per year. Failure to pay court-ordered attorney's fees or reimburse the court for fees paid on a party's behalf may result in a legal action being initiated to collect overdue payments and interest on overdue amounts.

7. ADDITIONAL ORDERS

- a. The parties and their counsel are ordered to cooperate with counsel for the child to permit the performance of his or her duties.
- b. Counsel for the child must be provided with complete copies of all relevant copies of proceedings within 10 days of the appointment.
- c. The parties must provide complete information concerning the child's school, medical, psychological, psychiatric, and other pertinent records to the child's counsel on request. The parties must execute such waivers and releases necessary to facilitate the child's counsel in securing access to records for the child.
- d. The parties and/or their counsel must not compromise, settle, dismiss, or otherwise remove from the court's calendar all or any portion of the issues, claims, or proceedings concerning which the child's counsel has been appointed, without participation of the child's counsel or advance notice to the child's counsel.

8. OTHER ORDERS:

9. Counsel must continue to represent the child until the appointment terminates as provided in rule 5.240(f) of the California Rules of Court.

THE COURT SO ORDERS.

Date:

JUDICIAL OFFICER

In some cases, the family court judge might appoint a private attorney to represent a child in a custody or parenting time (visitation) case. These attorneys are often called “minor’s counsel.”

Why might the court appoint an attorney for a child?

The court might appoint an attorney for a child for many different reasons. For example, if parents significantly disagree about issues of parenting time and a child is experiencing stress, the court might appoint an attorney to represent the child in the case.

What will minor’s counsel do?

Minor’s counsel will:

- gather and present evidence about the best interests of the child; and
- if the child wants, minor's counsel will present the child’s wishes to the court.

Generally, minor’s counsel will also:

- interview the child; and
- review court files and records available to the parties, and make additional investigation.

Minor’s counsel:

- cannot be called as a witness, but can bring witnesses for the child's case.
- can see a child’s medical, dental, mental health, and other health care records, and school and educational records.
- has the right to interview school personnel, caretakers, health care providers, mental health professionals, and others who have assessed the child or provided care to the child.

Who pays for minor's counsel?

Sometimes, the court will cover the cost of minor’s counsel, but in general, the parties pay for the attorney for their child. The court must determine the reasonable amount for the attorney. The court must also decide about the ability of the parties to pay all or some of that amount. If the

parties do not pay, the attorney or the court could bring a case against them to collect the money. If the court finds that the parties are not able to pay all or some of the cost, the court must pay the part the parties can’t pay.

Who can ask that minor’s counsel be appointed?

Parties and their attorneys, other types of attorneys, the child or a relative of a child, or a child custody mediator, recommending counselor, or evaluator may ask the court to appoint minor’s counsel for the child. The court may also decide to appoint minor’s counsel without a request.

What will a court order for minor’s counsel include?

The court must make written orders when appointing and terminating counsel for a child.

Appointment orders must include the appointed counsel’s name, address, and telephone number; name of the child for whom counsel is appointed; and the child’s date of birth.

Orders might also include

- the child’s address, if appropriate;
- issues to be addressed in the case;
- tasks related to the case that would benefit from the services of counsel for the child;
- responsibilities and rights of the child’s counsel;
- counsel’s rate or amount of compensation;
- allocation of fees payable by each party or the court;
- source of funds and manner of reimbursement for costs and attorney’s fees;
- allocation of payment of attorney’s fees to one party subject to reimbursement by the other party;
- terms and amount of any progress or installment payments; and
- ability of the court to change the order on fees and payment.

When does the minor's counsel stop representing the child?

The attorney keeps representing the child until the court decides otherwise, when the case ends, or when the child turns 18.

Does the court have a list of attorneys who might be appointed?

The court may or may not maintain a list or panel of attorneys meeting the minimum qualifications to be appointed. The court may also appoint attorneys not on a list and may take into consideration factors including language, culture, and the special needs of child.

What do I do if I have a complaint about minor's counsel?

Ask the court about its complaint procedures.

What kind of qualifications must attorneys have to be appointed?

An attorney must be an active member in good standing of the State Bar of California; have professional liability insurance or demonstrate to the court that he or she is adequately self-insured; and have completed at least 12 hours of education and training on specific topics (see California Rules of Court, rule 5.242). The attorney must have a certain amount of experience before being appointed and also receive at least 8 hours of additional training each year.

How does the attorney tell the court he or she is qualified?

The attorney must file a declaration with the court indicating compliance with all requirements no later than 10 days after being appointed and before beginning work on the case.

Family Code section 3151

3151. (a) The child's counsel appointed under this chapter is charged with the representation of the child's best interests. The role of the child's counsel is to gather evidence that bears on the best interests of the child, and present that admissible evidence to the court in any manner appropriate for the counsel of a party. If the child so desires, the child's counsel shall present the child's wishes to the court. The counsel's duties, unless under the circumstances it is inappropriate to exercise the duty, include interviewing the child, reviewing the court files and all accessible relevant records available to both parties, and making any further investigations as the counsel considers necessary to ascertain evidence relevant to the custody or visitation hearings.

(b) Counsel shall serve notices and pleadings on all parties, consistent with requirements for parties. Counsel shall not be called as a witness in the proceeding. Counsel may introduce and examine counsel's own witnesses, present arguments to the court concerning the child's welfare, and participate further in the proceeding to the degree necessary to represent the child adequately.

(c) The child's counsel shall have the following rights:

(1) Reasonable access to the child.

(2) Standing to seek affirmative relief on behalf of the child.

(3) Notice of any proceeding, and all phases of that proceeding, including a request for examination affecting the child.

(4) The right to take any action that is available to a party to the proceeding, including, but not limited to, the following: filing pleadings, making evidentiary objections, and presenting evidence and being heard in the proceeding, which may include, but shall not be limited to, presenting motions and orders to show cause, and participating in settlement conferences, trials, seeking writs, appeals, and arbitrations.

(5) Access to the child's medical, dental, mental health, and other health care records, school and educational records, and the right to interview school personnel, caretakers, health care providers, mental health professionals, and others who have assessed the child or provided care to the child. The release of this information to counsel shall not constitute a waiver of the confidentiality of the reports, files, and any disclosed communications. Counsel may interview mediators; however, the provisions of Sections 3177 and 3182 shall apply.

(6) The right to reasonable advance notice of and the right to refuse any physical or psychological examination or evaluation, for purposes of the proceeding, which has not been ordered by the court.

(7) The right to assert or waive any privilege on behalf of the child.

(8) The right to seek independent psychological or physical examination or evaluation of the child for purposes of the pending proceeding, upon approval by the court.

Item SPR11-37 Response Form

Title: **Family Law: Counsel Appointed to Represent a Child in Family Law Proceedings** (amend Cal. Rules of Court rule 5.242; revise form FL-323; approve form FL-321-INFO)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Monday, June 20, 2011

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.