



## Bringing light to the darkness

### REPRESENTING DEPENDENT MINORS

In 2010, a frantic mother called our firm stating that her son Anthony, who was currently in the foster-care system, had been sexually abused by his older foster brother. Anthony was nine years old. The perpetrator was 14. Anthony's social worker encouraged his mother to contact a law firm because this wasn't the first time the perpetrator had sexually abused younger boys. So began our firm's journey toward becoming experts in representing youth who are in the California Juvenile Dependency System, or who are teetering on the brink of it.

Representing any minor comes with a unique set of challenges and rewards. Representing minors whose parents do not have legal rights to bring a lawsuit on their behalf, or who may even be part of the reason a lawsuit is warranted, presents an entirely different set of challenges. This article explores how cases involving foster youth develop, how attorneys are typically hired in these cases, and the special issues and considerations you must look at closely if your client is involved in the foster care system.

#### Law suits brought by dependent minors

It should come as no surprise that minors who are in the dependency system can bring lawsuits for any injuries or damages they sustain as a result of someone else's negligent acts or omissions. If they are involved in a car accident or bitten by a dog or slip and fall on one of the many grapes littering grocery store floors (according to law school text books), the fact that they are in the dependency system should not, and does not, prevent them from seeking redress.

But things become a bit more complicated if the liable party is the county itself. When minors are declared dependents of the juvenile court, the

county is given care and custody of them. Their parents often lose legal rights to the children, including the right to bring a lawsuit on their child's behalf. If the county then fails to protect them from dangerous situations (such as placing them in a home with a known sexual predator), these children still have a constitutional right to seek redress for their harm.

Children with open dependency cases have a right to counsel. (Welf. & Inst. Code, § 317, subd. (c).) As with criminal defendants, the court will appoint an attorney if the child does not already have one. It is that appointed attorney's responsibility to advocate for the child's "protection, safety, and physical and emotional well-being." (Welf. & Inst. Code, § 317, subd. (c)(2).) That attorney must also "investigate interests of the child beyond the scope of the juvenile proceeding and report to the court interests of the child that may need to be protected by the institution of other administrative or judicial proceedings." (Welf. & Inst. Code, § 317, subd. (c)(3).) This means that minor's counsel must be on the lookout for and identify torts that may have been committed against the child. If the minor's counsel has reason to believe that his or her client has been the victim of a tort, he or she must inform the court and contact an attorney who specializes in personal injury to investigate whether a lawsuit is appropriate under the circumstances.

#### Getting hired and first steps

Once a juvenile dependency attorney has identified a tort, he or she must request to be appointed as the guardian ad litem for purposes of hiring a civil attorney and pursuing a civil lawsuit on the minor's behalf. Typically, this involves filing a request to be appointed as guardian ad litem with a brief explanation

as to why such an appointment is necessary and a description of the alleged tort that was committed.

Once appointed as the guardian ad litem, the juvenile attorney has the capacity to hire a personal-injury attorney on the minor's behalf. Often, that can involve having the personal-injury firm appointed as special counsel on behalf of the minor, pursuant to Welfare and Institutions Code section 317, subdivision (c)(3). While being appointed as special counsel is an extra step to take before being hired on these cases, we have found it helpful in terms of obtaining access to the minor's juvenile case file or other confidential materials maintained by the dependency system. Some courts have created standing orders that automatically require county Child Protective Services divisions to provide special counsel with a copy of a minor's records, which can save a lot of time down the road. Regardless of whether you are appointed special counsel, it is always a good idea to have the guardian ad litem sign your standard fee agreement and any other retention documents you would have any other client sign at the outset of representation.

The date on which the juvenile attorney is appointed guardian ad litem is critical if the tortfeasor is a public entity, as it starts the clock ticking on the deadline to file a governmental claim. Typically, government claims must be filed within six months of the accrual of the cause of action. (Civ. Code, § 911.2.) If the claim is filed after that six-month time frame, then an application for leave to present a late claim must be filed within one year of the accrual of the cause of action. (Civ. Code, § 911.4) If the claimant was a minor during the entirety of the claim period, then the governmental board responsible for responding to the claim "shall grant the application" to present a late claim. (Civ.

Code, § 911.6, subd. (b)(2).) Importantly, “[t]he time shall not be counted during which a minor is adjudged to be a dependent child of the juvenile court... if the minor is without a guardian ad litem... for purposes of filing a civil action.” (Civ. Code, § 911.4, subd. (c)(3).) Thus, in any case in which you intend to sue the county Child Protective Services division, or any other governmental entity, you must file a governmental claim within six months of the date on which a guardian ad litem was appointed for the minor.

### Accessing juvenile case files and police records

Regardless of the type of case you are pursuing, you will likely want access to a child’s juvenile case file when representing a dependent minor. These records contain critical information about damages and present a detailed “before” picture to rely on throughout the lawsuit. A common defense strategy is to argue that dependent minors have already experienced a lot of trauma and difficulty in their lives, as evidenced by the fact that they are separated from their parents and in the foster care system. The defense then uses this prior trauma to elicit doubt as to the true cause of the plaintiff’s problems – are the nightmares the client is experiencing due to the abuse suffered in the foster care system or due to prior abuse suffered while in the custody of her parents? Is recovering from a car accident really worse than the neglect this child has already experienced at the hands of his own parents? Of course, the flip side of this argument is that dependent minors are often quintessential eggshell plaintiffs – the extreme difficulties they have experienced in their short lives make them that much less able to handle any additional suffering.

Aside from the issue of damages, in cases against county Child Protective Services divisions, a minor’s juvenile records are typically the only way to prove liability on the part of the county. These records contain crucial information about

exactly what steps a social worker took – or more often, failed to take – in investigating potential abuse or investigating a potential home at which to place a minor. Since government agencies and employees cannot be sued for negligence alone, the juvenile case file must be carefully examined to determine the breach of a mandatory duty.

Welfare and Institutions Code section 827 dictates exactly who may be given access to a dependent minor’s juvenile case file – and lawyers pursuing civil lawsuits on behalf of a minor are not on the list. However, courts may designate other individuals to receive a juvenile case file subsequent to the filing of a petition for access to the records. (Welf. & Inst. Code, § 827, subd. (a)(1)(Q).)

The petition – often referred to as an “827 Petition” – is not very difficult to file, though it can be somewhat time-consuming. It involves filling out a number of Judicial Council Forms and providing notice to several individuals, including the minor and his or her attorney, the minor’s parents and their attorneys, County Counsel, the child welfare agency, and other potentially interested parties, such as the District Attorney if the minor has an open delinquency case, and the child’s identified Indian tribe and CASA volunteer, if applicable.

After identifying parties who require notice, the following documents must be filed to request access to the records: Petition for Access to Juvenile Case File (JV-570), Notice of Request for Disclosure of Juvenile Case File (JV-571), a blank Objection to Release of Juvenile Case File (JV-572), a blank Order on Request for Disclosure of Juvenile Case File (JV-573), a blank Order After Judicial Review (JV-574), and a Proof of Service – Request for Disclosure (JV-569).

Note that even after receiving these records, they cannot be used freely in a civil case. Recipients of a juvenile case file are prohibited from distributing the records to any other person or agency and the records cannot be used as an attachment to any other document without the permission of the presiding

judge of the juvenile court. (Welf. & Inst. Code, § 827, subd. (a)(4).) That means opposing counsel must file their own individual 827 Petition to get access to the records before they can be used in a civil lawsuit. If juvenile records must be filed in a civil case for any reason, the majority of juvenile judges require that they be filed under seal.

Almost all cases involving physical and sexual abuse will also require you to obtain police records pertaining to the events in question. These records often include video and audio recordings of plaintiffs describing the abuse in question, either at the time of the detention, or in some cases, years earlier when they were disclosing abuse that county Child Protective Services agencies then failed to act upon. These records obviously contain critical evidence regarding what happened and who knew about it, but law enforcement agencies frequently refuse to provide the records absent a court order, citing confidentiality provisions pertaining to dependent minors, including Welfare and Institutions Code section 827.

Thus, it is often necessary to file another petition with the juvenile court to get access to the police records. This is commonly referred to as an 828 Petition, based on Welfare and Institutions Code section 828. This again involves providing notice to the minor and/or his or her parents and filing several Judicial Council Forms, including the Petition to Obtain Report of Law Enforcement Agency (JV-575), a Notice to Child and Parent/Guardian re: Release of Juvenile Police Records and Objection (JV-580), and Proof of Service – Juvenile (JV-510).

### Developing relationships with abused children

After getting appointed on a case and obtaining a child’s juvenile file, you are then faced with the prospect of meeting and trying to get to know a child who has, in many cases, been severely abused and has very little trust in adults. Frequently, they have reached out to adults for help in the past, only to be

ignored, shut down, called liars, or persuaded into changing their story. Getting them to open up to you and trust you as their attorney can be somewhat tricky.

As an initial note, I generally do not meet with my dependent minors until after I have obtained and reviewed their juvenile case file. These children have almost always been through so much more than whatever tort I am looking at for purposes of a lawsuit. I find it incredibly useful to have some knowledge of their background before jumping into a conversation. There are many seemingly benign topics that may trigger past traumatic events in their lives, and it is important to avoid those issues (to the extent possible) when developing a relationship.

You may expect children who are involved in the dependency system to be difficult to deal with. After all, many of their parents could be described as “absentee” and that’s in the best-case scenarios. They have all been removed from adults who were deemed unwilling or unable to care for them. What kind of upbringing must they have had? I was very surprised to learn that the majority of dependent minors are mature beyond their years. Many of them have been de facto raising their younger siblings since they were old enough to microwave a bottle, and they tend to have a knowledge of the world and how it works that is far beyond their years. Nevertheless, it is important to remember that they are still just kids.

A small gift or some candy can make a big difference at the initial visit. Reach out to the child’s caregiver to find out what your client is interested in. Does your younger client love stuffed animals and Skittles? Do you represent a teenager who is interested in makeup and nail polish? Do you have a budding artist who may enjoy a few art supplies? These small gestures can go a long way toward helping these children feel cared for and valued at the start of a new attorney-client relationship.

It is important to spend as much time as necessary (sometimes the entire

first visit) explaining what a lawyer is and how you fit into the picture. Depending on how long the child has been in the foster care system, she may be used to a wide variety of barely recognizable adults coming into her life and relaying important information – different lawyers, social workers, therapists, caregivers, and other service providers, to name a few. But this steady stream of adults may also be overwhelming to children, and they may have difficulty keeping track of everyone’s different roles. All juvenile dependents have attorneys in their dependency cases, and some abused children are also interacting with the district attorney as their perpetrator is prosecuted. Children may have a hard time understanding why a third lawyer is now involved in their lives and how your role differs from the other attorneys they have.

### **Explaining what you will do**

It is helpful to start by explaining what an attorney does and explaining the differences between civil and dependency lawyers. Some children grasp this right away; others need a refresher course at the beginning of every visit. Spend time talking about what a lawsuit is, how the civil system works, and what we hope to accomplish. Be honest about the fact that you have read some documents about them and that you know what they have been through. Let them know that you believe them and that it never should have happened. Don’t hesitate to acknowledge that a monetary recovery will not make their situation better – it does not take away the pain, it does not mean that what happened is okay, and it certainly won’t make their current circumstances any better, but it can help them when they are older and it can ensure that other kids do not go through what they experienced. Praise their bravery in helping to keep other kids safe by being willing to participate in a lawsuit.

It is also important to discuss confidentiality with these children, who may be inclined to immediately tell their

social worker, their biological parents, or others about their lawsuit. For children who have experienced abuse, discussing confidentiality can be tricky. For example, using the word “secret” in a sexual abuse case can trigger distressing memories if their perpetrator asked them to keep the abuse a secret. Assure your young clients that you will not tell anyone about anything they tell you – not their caregiver, not their parents or siblings, not their dependency attorney – *unless* they ask you to do so. Remember, they may want you to disclose some information in order to help them. Civil attorneys cannot do anything for a child who is unhappy in his or her foster placement, but you can communicate with the dependency attorney and advocate for a change of circumstances if appropriate.

The goal, of course, is to make the child feel comfortable with you and your role in their life. Both younger children and teenagers appreciate being told that they are the “boss” and that we work for them. Let them know they are important and that there is a whole team of people working on their case, focusing on what happened to them, and doing everything we can to help them. Reiterate that you care about what they went through and are going to try to hold the adults responsible to account.

After that initial meeting, keep up regular contact with the plaintiff. Children have short memories and a lot going on in their lives. When the time finally comes to have serious talks about the abuse they endured, to prepare them for testimony, or to send them for treatment, you want them to be comfortable and know that you have their best interests at heart. These children often do not have many adults they can rely upon, so representing them in civil lawsuits is a beautiful opportunity to be one such person in their lives, whether that means remembering to send birthday cards, showing up to take them out for pizza and a movie, or holding the hands of girls who have been sexually abused during

gynecological exams and assuring them that they are safe.

The client is not the only person whose trust you have to earn. The minors' caregivers can be critical damages witnesses, as they see how the children have been affected by the injuries they suffered. They may be able to testify about nightmares, crying spells, panic attacks, anxiety, problems at school or with peers, or other behaviors indicative of trauma. For cases involving physical injuries, the caregivers can talk about doctor's visits, at home exercises and efforts to get better.

### Keeping the money safe

A successful lawsuit will result in some form of monetary compensation for the minor. As in all cases involving minors, the settlement and means of distributing the funds are subject to court approval by way of a minor's compromise petition.

In cases involving minor dependents, special consideration should be taken regarding how to protect the funds after the minor turns 18. In many cases, biological parents and other family members suddenly re-emerge on the scene once a minor is given a substantial reward, even if they have been absent

from the child's life for many years. If a case has been the subject of any media attention, it is even more critical to take steps to protect these vulnerable clients from potential predators looking to take advantage of their financial naivete. A typical annuity may not be sufficient to protect dependent minors who receive large settlements.

It may be necessary to set up a trust. In many cases, a special needs trust should be considered, particularly if the plaintiff is receiving, or is eligible to receive, Medi-Cal or disability benefits. Special needs trusts have the dual benefit of protecting the client's benefits and their assets. It is critical to hire a trust attorney who is familiar with the rules of the county in which the trust is being created. You must also thoughtfully choose a trustee who can both oversee the trust and form a relationship with the child. In light of these children's unique vulnerabilities, it is critical that the trustee be someone the child trusts and feels comfortable with. There may not be any family members who are appropriate, and a professional fiduciary should certainly be considered. Ideally, the trustee will have experience working with children, especially those who have been abused, and will have knowledge about how to

help young adults navigate their finances. We have also found it helpful to hire a financial planner who can meet with the client routinely as they approach adulthood to teach them how to manage a budget, pay bills, make wise investments, and otherwise develop a healthy relationship with money.

### Conclusion

Representing dependent minors comes with its own set of challenges. There are extra hoops to jump through and connecting with the clients can be difficult. But the joy that comes with achieving justice for these young clients is unparalleled. It is a privilege to go to bat for these children, who often have not had great experiences with "adult" institutions that are supposed to be caring for them. Both the children and you can sleep easier knowing they have someone in their corner.

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