Supreme Court Case No. **S260928**

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re A.R., a Person Coming Under the Juvenile Court Law. ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Petitioner and Respondent, v. M.B., Objector and Appellant.	First District Court of Appeal Case No. **A158143** Alameda County Superior Court Case No. JD-028398-02

On Review from the Unpublished Order of the First District Court of Appeal, Division One, filed January 21, 2020, from the Judgment of the Alameda County Superior Court, the Honorable Charles Smiley III, presiding.

CALIFORNIA APPELLATE PROJECTS' APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF OBJECTOR / APPELLANT M.B.

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.200, three appointed counsel programs, Appellate Defenders, Inc., Central California Appellate Program, and the California Appellate Project, Los Angeles, seek permission to file an Amicus Curiae brief in support of Appellant/Petitioner M.B., which is lodged concurrently with this application. This application is filed after discussion with and the consent of Louise Collari, Staff Attorney, First District Appellate Project, counsel for Appellant.

STATEMENT OF INTEREST

There are five appointed counsel offices which serve the six appellate districts in California. Appellate Defenders, Inc. ("ADI"), is the appointed counsel administrator for the Fourth Appellate District. The Los Angeles office of the California Appellate Project ("CAP/LA") manages the court-appointed counsel program for the Second Appellate District Court of Appeal. The Central California Appellate Program ("CCAP") is the appointed counsel administrator for the Third and Fifth Appellate Districts.[1]

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[1] The First District Appellate Project ("FDAP") serves the First Appellate District Court of Appeal and represents Appellant/Petitioner in this matter. The Sixth District Appellate Program ("SDAP") serves the Sixth Appellate District Court of Appeal and represents the Minor in this matter. This Court already has the advantage of positions taken by two of the appellate projects in briefing. The three (continued...)

Each of the appellate programs are nonprofit law offices, authorized under California Rules of Court, rule 8.300(e), to provide administrative services related to appointment of counsel by the Courts of Appeal. The offices operate under a contract with the California Administrative Office of the Courts. The central goal of the offices is to improve the quality of indigent representation on appeal and to assist the Court of Appeal in administering criminal, juvenile, and limited civil appeals by indigents who are entitled to the appointment of counsel at public expense. The guiding concept is to engage the resources of appellate practitioners, to oversee this work, and attempt to assure consistently satisfactory representation of all clients. A percentage of appointments by the three amici curiae are for juvenile dependency clients, both parents and minors, following orders pursuant to Welfare and Institutions Code section 366.26, the permanent planning stage which includes termination of parental rights.

In fulfillment of their goals, the offices perform the preliminary case processing of notices of appeal, seeking background information about cases, ascertaining appellant's need for appointed counsel, and arranging for delivery of transcripts. One of their responsibilities is to screen notices of appeal once they have been filed and processed by the Court of Appeal. In

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[1](...continued)
remaining projects comprise amici curiae.

some instances, the late filing is noticed only after a notice of appeal has been processed, a record prepared, and before or after the appointment of counsel. In those instances, it is the appointed counsel project that is responsible for interacting with the party whose appeal has been dismissed as untimely or assisting the appointed counsel upon the dismissal of the appeal.[2]

Also, California Rule of Court, rule 8.406(c) requires that the superior court clerk must mark a late notice of appeal in a juvenile case as received but not filed and "send a copy of the marked notice of appeal to the district appellate project." This places a responsibility on the appellate project to screen the notice of appeal and the clerk's notice. In certain instances, the appellate project communicates with the superior court to request reconsideration of the determination that a notice was untimely or failed to meet other requirements. Also, the appellate project communicates with the late party and trial attorney or the project is contacted by the late party based on the clerk's notice.

As more fully stated in the brief, it is our view that application of the

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In recent history, CCAP assisted a mother whose appeal was dismissed after trial counsel filed a notice of appeal one day late. That case resulted in a petition for review which was denied. (*In re Sophia V.*, S259156, review denied 1/29/2020.) Currently CAP/LA is aware of three late notices of appeal in which parents may potentially argue for constructive filing based on trial counsel's mis-step in filing a late notice of appeal.

constructive filing doctrine can and should apply to juvenile dependency proceedings when a party has relied on the trial attorney to carry out the duty of filing a notice of appeal. A noticed motion is the proper procedure for a parent to raise a claim that a notice of appeal was not timely filed due to ineffective assistance of counsel. Amici curiae argue that relief should be made available, on a case-by-case basis, after weighing the interests of state, the parent, and the child in determining whether to exercise constructive jurisdiction of the appeal.

NEED FOR AMICUS PARTICIPATION

The central issue in the briefing by the parties is whether a party who relied on trial counsel to file the notice of appeal may proceed when trial counsel files a notice of appeal beyond the 60-day deadline after a termination of parental rights. The court limited review to the following issues: (1) Does a parent in a juvenile dependency case have the right to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights under Welfare and Institutions Code section 366.26? (See Welf. & Inst. Code, § 317.5, subd. (a); In re Kristin H. (1996) 46 Cal.App.4th 1635 [ineffective assistance of counsel claim in dependency proceeding brought on a petition for writ of habeas corpus].) (2) If so, what are the proper procedures for raising such a claim?

The three appointed counsel programs seek permission to participate

as amici curiae in order to present a perspective that is broader than that of Appellant, Respondent, and Minor. Justice is best served by a thorough review of the law and the varied positions taken with respect to this important issue. The appointed counsel projects, as representatives of parties in juvenile law dependency appeals before appellate counsel is appointed, as well as advocates for appellate review, take a position supporting constructive filing relief to promote access to the courts. The projects agree that such a motion must address various factors as described more fully in the briefing.

The briefing by both sides addresses whether a procedure applicable in adult criminal law cases should apply equally and in juvenile dependency cases. Amici curiae approach the issue relying primarily on juvenile law and concepts concerning the right to appeal common to all fields of law. This is not counter to the issues addressed by the parties, but shifts the focus to give the Court a different, broader perspective on the issue as it relates to framing a standard or providing guidance in future cases with late notices of appeal.

Amici curiae have considerable knowledge and experience advocating for persons who have filed late notices of appeal in the criminal, juvenile, and limited civil settings. Through its brief, amici curiae will discuss the recent historical facts regarding one of the project's experience

with late notices of appeal in a context similar to this case. Amici will argue that a parent who has reasonably relied on his or her trial counsel to file the notice of appeal during the 60-day jurisdictional period should be allowed to demonstrate that counsel's failure to do so should not in all cases foreclose review through the doctrine of constructive filing.

Amici curiae respectfully request that this court permit it to submit this brief to address the issues raised in this case and provide the perspective of the projects which, pursuant to California Rules of Court, rule 8.406(c), investigate the circumstances surrounding a notice of appeal that is not filed by the juvenile court because it is late.

Date: October 07, 2020

Respectfully submitted,
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I. The Juvenile Law Provides a Remedy For Counsel's Mis-Step; It Permits the Constructive Filing of Petitioner's Notice of Appeal.

Petitioner sets out a strong case for applying the constructive filing doctrine to the late notice of appeal filed in the present case. The doctrine provides a remedy for a late-filed notice of appeal and is utilized in criminal and civil cases as set forth in the *In re Benoit* case and its progeny. (*In re Benoit* (1973) 10 Cal.3d 72, 84; *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113 [extending prison delivery rule to civil cases].) The doctrine does not create jurisdiction where none exists, but recognizes *constructive* jurisdiction if justice and due process so requires. (See *In re Benoit*, supra, 10 Cal.3d at pp. 83-84; *Silverbrand v. County of Los Angeles*, *supra*, 46 Cal.4th at pp. 113-114.)

As it is compelled to do (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455), amici curiae acknowledge this Court previously declined to import prophylactic procedures available in criminal cases to an appeal from an order terminating parental rights under the Welfare and Institutions Code. (*In re Sade C.* (1996) 13 Cal.4th 952, 992.) Second, as they must also do, Amici are guided by the manner in which the Court framed the issues for review in this case, that is, the Court's reference not to the adult criminal law, but to the Juvenile Court Law. (Welf. & Inst. Code, § 200 et seq.)

With these guideposts before them, Amici argue the Court need only look to existing juvenile dependency law, and principles governing all appeals, to answer the question presented here whether, in an appropriate case, and with due consideration for the interests of the parties involved in the dependency case, trial counsel's mis-step in filing a late notice of appeal from an order terminating parental rights may be remedied by allowing for the *constructive timely filing* of the notice of appeal. Amici do not propose a bright-line rule allowing relief in all cases where such mis-step occurs. Nor do they agree with a bright-line rule denying prophylactic relief. Instead, Amici take the position prophylactic relief should be made available, on a case-by-case basis, after weighing the interests of the state parens patria, the parent, and the child in determining whether to exercise *constructive jurisdiction* of the appeal.

A. The Duty And Its Omission.

In the first instance, there must be a duty to enforce. California creates a statutory duty requiring appointed trial counsel in criminal and *juvenile law* cases to pursue an appeal for the client in specified circumstances. (Pen. Code § 1240.1, subds. (a), (b).) Subdivision (b) of Penal Code section 1240.1 addresses the situation here, trial counsel's duty to file a notice of appeal when the client asks. It provides in pertinent part:

> (b) It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal . . . when directed to do so by a defendant having a right to appeal.

(Pen. Code, § 1240.1, subd. (b).)

Amici recognize lower courts have addressed the application of Penal Code section 1240.1, subdivision (b) to juvenile dependency cases, on different facts, and reached the opposite statutory interpretation. (E.g., *Guillermo G. v. Superior Court* (1995) 33 Cal.App.4th 1168, 1173-1174.) Amici urge that the decision in *In re Simeth* (1974) 40 Cal.App.3d 982 is instructive and key, and supports the conclusion the Legislature intended that section charging appointed trial counsel with the duty to pursue an appeal for her client to apply in all cases. (*Id.*, at pp. 984-985.) Penal Code section 1240.1, like section 1241, is found in Title 9 [Appeals in Felony Cases]. As noted in *Simeth*, the Legislature amended its neighbor, Penal Code section 1241, to delete the limitation of its provisions for the compensation for appointed appellate counsel to criminal cases, and to read and apply, as it does today "*[i]n any case* . . ." [italics added]. (*In re Simeth*, *supra*, 40 Cal.App.3d at p. 984; Pen. Code, § 1241.) Relying on the statutory amendment, the court extended the right to appointed appellate counsel to a parent appealing the judgment in a dependency case . (*In re Simeth*, *supra*, at pp. 984-985.) By extension, "the duty of every attorney

representing an indigent defendant in any criminal, *juvenile court*, or civil commitment case" to file a notice of appeal "when directed to do so by a defendant having the right to appeal[]" found in neighboring Penal Code section 1240.1, subdivision (b)(1) should include dependency cases heard in juvenile court. (See *In re E.A.* (2018) 24 Cal.App.4th 648, 660 [in any case involving statutory interpretation, the reviewing court gives the words of the statute their usual and ordinary means and views them in their statutory context].) Juvenile dependency proceedings are conducted by the *juvenile court*. (See Welf. & Inst. Code, § 245 [when conducting proceedings under the Juvenile Court Law, the superior court shall be known and referred to as the juvenile court].) Simeth does not stand alone. (See *In re Norma M.* (1975) 53 Cal.App.3d 344, 347 [deeming it the duty of appointed trial counsel to perfect an appeal if the client so requests]; see also *In re Jacqueline H.* (1978) 21 Cal.3d 170, 177-178 [citing *Simeth* with approval].)

In addition to the statutory duty of appointed trial counsel to file a notice of appeal, decisional law tacitly charges trial counsel with that responsibility. "A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney he must be heard through him, and it is indispensable . . . that such attorney shall have the management and control of the action . . . . So long as he remains

attorney of record the Court cannot recognize any other as having the management of the case." (*Board of Comm'rs of Funded Dept. of San Jose v. Younger* (1865) 29 Cal. 147, 149; *In re Barnett* (2003) 31 Cal.4th 466, 478, [represented party has no right to present their case personally].)

Indeed, the dependency proceedings conducted in the juvenile court below corroborate the assertion appointed trial counsel has a duty to file a notice of appeal in a dependency case when the client so requests. The record of the section 366.26 hearing shows that the juvenile court ordered that trial counsel continue to represent Petitioner until expiration of the 60-day period for filing a notice of appeal. (6/12/19 RT 10.) Finally, the statewide rules providing for the parent's *or the attorney's signature* on the notice of appeal implicitly recognize the duty of trial counsel to perfect a notice of appeal. (Cal. Rules of Ct., rule 8.405(a)(2) [appellant or appellant's attorney must sign the notice of appeal].)

The duty of counsel to protect and perfect her client's right to appeal takes on even more significance at the section 366.26 stage, in light of the fact the court is not required to advise the parent of his or her right to appeal the postjudgment, permanency planning hearing order. The juvenile court's duty to advise a party of the right to appeal does not track the scope of the statutory right to appeal. (Welf. & Inst. Code, § 395, subdivision (a)(1) [the judgment and subsequent orders (with exceptions not relevant here) are

appealable].) Indeed, there appear to be only two situations in which the statewide court rules require the juvenile court to advise the parent, guardian, and child in a dependency case of the right to seek review: (1) at disposition on an original (§300), subsequent (§342) , or supplemental (§387) petition [Cal. Rules of Ct., rule 5.590(a) [notice required re. right to appeal]; and (2) upon the setting of a Welfare and Institutions Code section 366.26 hearing [Cal. Rules of Ct., rule 5.590(b) [notice required re. right to seek statutory writ relief].) The juvenile court has no statutory duty imposed by statute or court rule to advise a party of the right to appeal at the permanency planning stage of the dependency case.

Thus, Amici have established appointed trial counsel in a dependency case has a duty to timely file a notice of appeal upon the client's request. Here, trial counsel did not timely do so.

B. Enforcement Mechanism.

In addition to imposing that duty on trial counsel, the California legislature has created a mechanism for enforcement of that duty. "All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel." (Welf. & Inst. Code, §317.5, subd. (a).) Second, California case law ensures protection of the right to competent counsel through the vehicle of appellate review of a claim of ineffective

assistance of trial counsel. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667 [mother's statutory right to competent counsel entitled her to review of her claim of the violation of that right].) Amici request this Court invoke that mechanism here.

As the court observed in *Kristin H.*, the statutory right to competent counsel "was intended to address, among other issues, 'the problem of a lack of any meaningful process whereby parents or dependent children can complain about their appointed counsel.'" (*Id.* at p. 1663.) An attorney's failure to apply and follow the law is ineffective assistance of counsel. (*Id.* at p. 1668; e.g. *In re S.D.* (2002) 99 Cal.App.4th 1068, 1077-1078 [attorney's failure to follow § 300, subd. (g)].) Here, trial counsel's failure to file a timely notice of appeal at petitioner's request amounted to a failure to follow Penal Code section 1240.1, subdivision (b).

Thus far, Amici have shown (1) a legal duty; (2) a failure to discharge the duty; and (3) a mechanism to obtain relief, all of which are found within the juvenile court law. Of course, in any case where ineffective assistance of trial counsel is claimed, there is a foundational showing to be made. The claimant must show that trial counsel's omission was prejudicial. *(Kristin H., supra*, 46 Cal.App.4th at p. 1668 [parent must also establish that counsel's error was prejudicial].) Here, Petitioner must show she was not at fault for the late notice of appeal. Petitioner, too, had a

duty to ensure a timely notice of appeal was filed from the order terminating her parental rights by filing the notice of appeal herself, or by asking trial counsel to file the notice of appeal on her behalf. She did the latter, before the 60th day. No more should be required of her. Thus, the prejudice prong of this claim of ineffective assistance of trial counsel has also been shown. But for trial counsel's mis-step, a timely notice of appeal could and would have been filed.

Amici acknowledge there is a factor - personal to the minor - strongly figuring in the determination whether, having established the elements of a statutory claim of ineffective of trial counsel, there is a remedy. In adoption related proceedings, this Court has once noted that attorney error is not always remediable. (*Adoption of Alexander S.* (1988) 44 Cal.3d 857, 868.) Amici concede that attorney error in failing to file a timely notice of appeal from an order terminating parental rights may not always be remediable. The passage of time may work against the availability of relief. (*Id.*, at p. 866.) But it should not follow that the door to review is always closed in a case where only trial counsel is to blame for the passage of the time to timely file a notice of appeal, and the passage of time has not been long.

The proposed remedy invoked here is not a new remedy, or an exclusive one. Originating in this Court in *Benoit*, *supra*, a criminal case,

and extending, through this court in *Silverbrand*, *supra*, the constructive filing doctrine should no less be available for application in a juvenile dependency case. Although they are "special proceedings" (*In re S.B.* (2004) 32 Cal.4th 1287, 1292-1293), juvenile dependency proceedings, too, are civil in nature. (*In re A.Z.* (2010) 190 Cal.App.4th 1177, 1180-1181.)

Here, days, not months, passed beyond the filing date for a notice of appeal. In weighing the minor's interests in the conclusion of the dependency proceedings, this Court has spoken: "Time counts more." (*In re Sade C.*, *supra*, 13 Cal.4th at pp. 989-990, [dependency proceedings must be concluded as rapidly as possible as is consistent with fairness].) Here, too, time counts, but its passage is not so extended to require denial of a motion for constructive filing of Petitioner's notice of appeal. There had been no significant passage of time after the 60-day period for filing a notice of appeal had expired. Under the statutory guidelines for adoption of a child after termination of parental rights, the passage of a mere three days after the expiration of the appeal period neither practically nor legally appreciably postponed permanency for the Minor. (Welf. & Inst. Code, 366.26, subd. (j) [petition for adoption may not be granted until appellate rights of the natural parents have been exhausted].) Form should not prevail over substance. (Cf. *In re Celine R.* (2003) 31 Cal.4th 45, 60 [minor's counsel should not stand on procedure which may not be in the

minor's interest].)

It appears the Minor is in a stable pre-adoptive placement. There is no clear indication an adoption petition was filed on the fourth day after the expiration of the time to appeal. There is no indication that hearing Petitioner's appeal will jeopardize the Minor's adoptive placement. Respondent speculates allowing this appeal to proceed "could destabilize permanency." (RBM p. 10.) Respondent also speculates allowing constructive filing "undermines the security a dependent minor must feel after a years long case . . ." (RBM p. 25.) Minor just turned four years old. It is highly doubtful she is aware of this litigation or that anything in her world is being "delayed" or that conducting appellate review would create any undue turmoil for her.

In a case such as this, there is no clear impediment -- i.e., no significant passage of time -- to remedying trial counsel's mis-step.

Whether by importing prophylactic procedures in criminal law, or by relying on the existing juvenile law guarantees of effective assistance of counsel and the right to review of a claim of ineffective assistance of trial counsel, the reviewing courts should open their doors to an application seeking the constructive filing of a notice of appeal that trial counsel failed to timely file. Petitioner proposes relief be made available in an appropriate case for that mis-step. (ABM pp. 45-48.)

C. Reviewing Courts Safeguard the Preference for Review.

Petitioner has given examples in her briefing of situations to support the position that - where justice demands - the opportunity for review will be expanded where the usual course for review has been thwarted by the juvenile court. In some, the reviewing courts declined to foreclose review where the time or form of review had not been observed. (Response to Minors Brief, pp. 11-12.) There are ready examples of case-specific flexibility in order to avoid forfeiture of appellate review when fairness demands.

In *Cathina W., infra*, the juvenile court clerk sent late and inaccurate notice to mother of the right to seek review by writ of the order setting a Welfare and Institutions Code section 366.26 hearing (hereafter, the setting order). This ministerial error prevented mother from filing a timely writ petition to obtain appellate review of the orders made at the setting hearing. (*In re Cathina W*. (1998) 68 Cal.App.4th 716, 723.) The setting order and all findings and orders issued contemporaneously therewith are reviewable only by statutory writ initiated by the timely filing of a notice of intent. (*In re Tabitha W*. (2006) 143 Cal.App.4th 811, 817.)

The *Cathina W.* court concluded the court clerk's mistake provided "good cause" to excuse mother's noncompliance with the writ procedure.

The remedy was to permit her to obtain review of the setting order and all contemporaneous orders in her appeal from the order terminating her parental rights at the section 366.26 hearing. In order to protect the parent's right to review first lost through no fault of her own, the reviewing court allowed later review by a different vehicle. (*In re Cathina W., supra*, 68 Cal.App.4th at p. 722-723; See also, *In re T.G.* (2015) 242 Cal.App.4th 976, 985 [writ review forfeiture rule is not absolute and is not applied "if due process forbids it," citing *In re Janee J.* (1999) 74 Cal.App.4th 198, 208; *Roxanne H. v. Superior Court* (1995) 35 Cal.App.4th 1008, 1012 ["the consequence of strictly enforcing all of the time frames prescribed by rule 39.1B [now § 366.26, subd. (l)] by threat of dismissal would place the petitioner in the untenable position of suffering the consequence for untimely filings over which he or she has no control."].) Amici request this Court allow later review of the order terminating Petitioner's parental rights through the vehicle of a motion for the constructive filing of the appeal from the termination order.

II. A Small Number of Dependency Cases Present this Problem; Even Fewer Will Qualify for the Remedy.

Amici propose (1) the opening of the door to review of trial counsel's failure to timely file a notice of appeal; and (2) guidelines for that review, five-points for consideration in deciding an application - whether by motion

or habeas petition -- for constructive filing of the notice of appeal - (1) trial counsel's duty; (2) trial counsel's omission; (3) the existence of an enforcement mechanism/right to effective assistance of trial counsel; (4) prejudice linked to trial counsel's omission; and (5) prejudice linked to minor's interest as affected by the passage of time. Amici recognize relief will not be available in all cases in which trial counsel is responsible for a late notice of appeal. Anecdotal information, *infra*, indicates there are relatively few late notices of appeal attempted to be filed from an order terminating parental rights. Also, the outcome in only one of the published cases foreclosing constructive filing of an appeal from an order terminating parental rights would not have been different if the guidelines proposed here had been applied.

A. Late-Notice Cases Represent an Exceptionally Small Number of Dependency Appeals.

ADI's analysis of dependency appeals submitted in the Fourth District over a two-year period (9-1-2018 to 9-1-2020) revealed the following:

– 51 late notices of appeal resulted in dismissals or non-filing under rule 8.40 (c). (Cal. Rules of Court, rule 8.406(c.));

– 1,370 timely dependency appeals resulted in appointment of counsel for the same period;.

– there were 1,421 successful and unsuccessful dependency appeals

1,421 (1,370 + 51 = 1,421);

– 51 late notices of appeal were 3.5% of all dependency appeals;

– nine of the 51 late-notice cases were from section 366.26 hearings;

– the nine late section 366.26 notices were .06 % of all dependency appeals during that period.[3]

The very low rate of late-notice filings in the Fourth District Court of Appeal from Welfare and Institutions Code section 366.26 indicates trial counsel and parents are fairly diligent in filing timely notices of appeal. And that providing the proposed remedy on a case-by-case basis would not create an undue burden on the reviewing court.

B. Two of Seven Cases Cited by Minor Presented Circumstances That May Have Allowed for the Constructive Filing of a Notice of Appeal from a Termination Order under the Proposed Guidelines for Deciding a Motion/Writ Seeking That Relief.

The Minor cites to seven cases to support her position that her need for finality in the dependency proceedings must prevail over Petitioner's interest in obtaining review of the order terminating her parental rights. (MBM pp. 41-42.) Some present circumstances similar to Petitioner's

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[3] One of these dismissed section 366.26 appeals requested constructive filing in the Court of Appeal, which was denied (*In re K.G.*, E075290). A petition for review is pending in S264422.

which called out for the relief requested here. The circumstances in others did not support relief then, and would not support relief under the guidelines proposed here by Amici. Under this section, Amici address only those cases illustrating a parent's reliance on counsel to file a notice of appeal from the termination order, or lack thereof. Petitioner's case is representative of a problem that can and should be addressed in a motion for constructive filing of a notice of appeal grounded on ineffective assistance of trial counsel.

In *In re A.M.*, *infra*, the mother requested constructive filing of her appeal from the order terminating her parental rights. The court denied mother's request to apply the constructive filing doctrine, citing the minor's "special need for finality" in juvenile dependency proceedings. (*In re A.M.* (1989) 216 Cal.App.3d 319, 322.) Mother's notice of appeal was not timely filed because mother's attorney could not reach mother to obtain her signature on the notice. Instead, the attorney signed and filed it one day late. (*Id.* at pp. 331-332.) The court concluded constructive filing was not a remedy available in juvenile cases. (*Id*. at p. 332.) However, mother's fault is not apparent. She requested her attorney to file the notice of appeal. The attorney should have signed the notice of appeal and filed it on the 60th day. (See Cal. Rules of Ct., rule 8.405(a)(2) [the appellant or the appellant's attorney must sign the notice of appeal].) This scenario does

fall within the proposed guidelines.

In *Ricky H.*, *infra*, mother's appeal from the twelve-month review hearing was pending when her parental rights were terminated at a section 366.26 hearing. (*In re Ricky H.* (1992) 10 Cal.App.4th 552, 557.) Mother did not tell her trial attorney she wanted to appeal the termination order. (*Ibid*.) When she told her appellate attorney she wanted the children returned to her, that attorney attempted to file a notice of appeal from the termination order nine days late. That appeal was dismissed as untimely. (*Ibid*.) Mother then moved to deem her existing appeal from the 12-month review hearing orders to also be a premature appeal from the later order terminating her parental rights. In the alternative, Mother moved for the constructive filing of her late notice of appeal from the termination order. (*Id*. at pp. 558-559)

The court declined to allow an appeal from the termination order under any of Mother's theories, noting the expiration of the time to file an appeal from the termination order was the fault of Mother, not her trial counsel or her appellate counsel. Here, trial counsel's sole responsibility for the passage of time without the filing of Petitioner's notice of appeal is undisputed.

In re *Z.S.*, *infra*, the court addressed the constructive filing doctrine in the context of a father's claim his notice of appeal was late due to his

incarceration. (*In re Z.S.* (2015) 235 Cal.App.4th 754, 776.) Without deciding whether the constructive filing doctrine is an available prophylactic measure for review of an order terminating parental rights, the court noted father made no showing his notice of appeal was late due to the negligence of prison officials, or any failing on trial counsel's part. (*Id*. a p. 769.) Again, Petitioner's circumstances are distinguishable. She has shown justifiable reliance on trial counsel.

Ryan R., *infra*, was also a close call, and the call was not made in the parent's favor. (*In re Ryan R.* (2004) 122 Cal.App.4th 595.) Mother contacted her counsel to file a notice of appeal late in the afternoon of the last day to request a notice of appeal from the order terminating her parental rights be filed on her behalf. The hour of the phone call does not appear in the opinion. Trial counsel received the message after the clerk's office had closed so she filed it the next court day, which was one day late. (*Id*. at p. 597.)

In an unsuccessful effort to obtain review, Mother argued she did not receive proper notice of her appeal rights. She did not raise the constructive filing doctrine, and it was not considered. (*Id*. at pp. 598-599.) However, constructive filing of the notice of appeal may have been appropriate in that case. The end of the work day for the clerk's office does not mark the end of the filing day for a document, including a notice

of appeal. (See Cal. Rules of Ct., rule 8.25(b)(3) [a document is timely filed if it is mailed by priority or express mail before the time to file it has expired].) Thus, trial counsel could have timely filed mother's notice of appeal by complying with rule 8.25(b)(3).

Isaac J., *infra*, is an example of a case in which this Court's "time counts more" factor worked against the request for constructive filing of a notice of appeal from an order terminating parental rights. (*In re Sade C.*, *supra*, 13 Cal.4th at pp. 989-990.) It is also an illustration of this Court's point there is not always a remedy for attorney error in an adoption related case. (*Alexander S.*, *supra*, 44 Cal.3d at p. 868.) Father attempted to appeal from orders terminating his parental rights in a private adoption action brought under the Family Code several months after notice of entry of that judgment was filed. His trial attorney miscalculated the time to file the notice of appeal and filed it 23 days late. More than a year and half later, Father requested constructive filing of his notice of appeal from the termination order. (*In re Issac J.* (1992) 4 Cal.App.4th 525, 529.) In response, the reviewing court created a bright-line rule barring the constructive filing of a notice of appeal from a termination order because "the child's interest in finality prevails." (*Id*. at p. 532.)

Disagreeing with the majority, Justice Timlin forcefully argued in his dissent that father presented sufficient grounds for constructive filing

relief. He proposed a case-by-case approach to addressing such claims, similar to the proposal Amici and Petitioner present here. (*Issac J.*, *supra* p. 541 (dis. opn. of Timlin, J.) Although they disagree with the bright line rule drawn by *Issac J.*, and advocated by Respondent and Minor, Amici concede that the "time counts more" factor called for the outcome in that case. More than two years elapsed after termination of parental rights before the request for constructive filing of the notice of appeal was presented. (*Id*. at pp. 528-529.) Bad facts can make bad law.

III. Significant Changes in the Juvenile Law Have Addressed Dependent Minor's Need for Finality and Have Reduced Delay in Securing Permanent Homes for those Children.

Amici recognize the minor's interest in stability and permanency is viewed as paramount at the section 366.26 hearing. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 324.) The Legislature has continued to protect those interests. Over the past 34 years, the Legislature has designed, revised, and amended the juvenile court to protect the minor's interests, particularly, to eliminate delay and facilitate permanency as soon as possible. *(In re Marilyn H*. (1993) 5 Cal.App.4th 295, 302-303.) Amici's proposed guidelines for consideration of a motion for constructive filing of a notice of appeal do not interfere with the legislative goal or the minor's interests.

As chronicled in this court's decision in *Cynthia D. v. Superior*

Court (1993) 5 Cal.4th 242), revisions to the statutory scheme in the early 1980s did not eliminate lengthy delays in terminating parental rights. A separate Civil Code section 232 action had to be filed in superior court to terminate parental rights, a cumbersome process at best. "Months, or even years, might pass before the separate termination proceeding would be completed in superior court." (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 257.)

The 1988 revisions to the juvenile law changed this. The legislation streamlined the termination process by eliminating the separate Civil Code section 232 action. And made the "critical substantive change" that only two findings were needed to terminate parental rights: (a) clear and convincing evidence the minor will likely be adopted; and (b) the finding that reunification services shall not, or should no longer be, offered. (Sen. Select Com. on Children & Youth/SB 1195 Task Force, Rep. on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (Jan. 1988) pp. 10-11 [hereafter "Task Force Report"].)

Achieving permanency and eliminating delay has also been furthered by the Legislature's expansion of the circumstances warranting the bypass of services to reunify parent and child. (§361.5, subd. (b)(1)- (17); *In re Joshua M.* (1998) 66 Cal.App.4th 458, 473 [bypass provisions are constitutional because they "provid[e] protection and stability to dependent

children in a timely fashion—by efficiently allocating scarce reunification services."].)

The original version of the bypass provisions enacted in 1986 contained only five grounds for denying parents reunification services. *(In re Joshua M., supra* , 66 Cal.App.4th at p. 467.) Now there are 17 grounds to deny services. (§361.5, subds. (b)(1)- (17).) When a bypass provision applies, an order setting a section 366.26 hearing can be made. In those circumstances, the case moves rapidly and directly from disposition to the permanency planning hearing. (§§ 361.5, subds. (b), (c), (d), (e),(f), and (g) [bypass provisions], 366.26 [selection and implementation of a permanent plan].)

Another feature of the Juvenile Law aimed at eliminating delay and achieving permanency for the minor is the Legislature's provision for review by statutory writ only of the order setting a Section 366.26 hearing. (§366.26, subd. (l).) This writ-review-only requirement is aimed at facilitating appellate review of the orders made at the setting hearing before the section 366.26 hearing is conducted. (*Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149, 156 ["the Legislature has unequivocally expressed its intent that referral orders be challenged by writ before the section 366.26 hearing."].) Moreover, decisional law has unanimously extended the requirement that review is by statutory writ only to all orders

made contemporaneously with the setting order. (*In re Tabitha W*. (2006) 143 Cal.App.4th 811,817.)

The Juvenile Law has evolved to address and protect the minor's need for permanency and to eliminate undue delay in the proceedings. In its efforts to achieve those goals, Respondent and Minor advocate a bright line rule to foreclose - in all circumstances - constructive filing of a notice of appeal from an order terminating parental rights. (RBM pp. 22-37; MBM pp. 12-35.) While this rule would be easy to apply, it does not recognize the interest of the parent in review, or that the minor, too, may share that interest. (See *Kristin H*., *supra*, 46 Cal.App.4th at p. 1664 [it may not always be true that preventing a parent from asserting a timely claim of ineffective assistance of counsel furthers the interests of the child].) The proposed bright-line rule does not balance the respective interests of the parties, the linchpin for resolving the tension between the minor's and the parent's interests in dependency cases. (*In re Marilyn H*., *supra*, 5 Cal.4th at p. 306.)

IV. In Most Cases, Trial Counsel Discharges the Duty to Timely File a Notice of Appeal.

It is the collective experience of the district project administrators, and the appellate courts, that the Petitioner's predicament is a rare one. Appointed trial counsel is practiced in, and customarily discharges, the duty

to file a timely notice of appeal when the client asks.

All appointed counsel appeals, including juvenile dependency cases, are administered by the district project administrators. In the course of that oversight, the project administrator sees firsthand a notice of appeal from an order terminating parental rights which has been filed and docketed in the Court of Appeal. In 2019, dependency appeals filed throughout the state totaled 3,097. Certainly, that number alone attests to the timeliness of notices of appeal filed in dependency cases.

Second, the project administrator also sees firsthand a notice of appeal from any order in a juvenile dependency case which has not been filed by the juvenile court. Pursuant to California Rules of Court, rule 8.406(c), project administrators are tacitly charged with the responsibility to screen and investigate each late notice of appeal rejected for filing by the juvenile court. The statewide rule provides in pertinent part: "The superior court clerk must mark a later notice of appeal "Received [date] but not filed," notify the party that the notice was not filed because it was late, and send a copy of the marked notice of appeal to the district appellate project.

Whether the cases cited by Minor in which the reviewing courts were presented with a late notice of appeal in dependency case were discovered in the course of a project administrator's screening of a docketed notice of appeal or a notice of appeal rejected for filing by the juvenile court, the

important fact is that those seven cases span the period between 1989-2015. Thus, it is reasonable to project any future cases in which trial counsel fails to timely file a notice of appeal will also be the rare exception. Indeed, the Court's decision in this case can be expected to further reduce the number of such instances.

V. Prejudice

Respondent and the Minor advocate for a "heightened" showing of prejudice, should a remedy for counsel's mis-step be offered. They posit Petitioner must show it reasonably probable that she would secure a favorable result in her appeal–that she would succeed on the *merits* of her appeal–not just succeed in having her tardy appeal reinstated. (RBM p. 43; MBM pp. 48-49.) They do not take issue with the prejudice Petitioner has actually shown: counsel's mis-step deprived Petitioner of her right to appellate review of the orders terminating her parental rights. Petitioner's showing is sufficient for constructively filing relief. (*See also*, *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 480; *Rodriquez v. United States* (1969) 395 U.S. 327, 329-330 [if counsel fails to file requested appeal, defendant entitled to new appeal without showing appeal likely has merit].)

A practical problem with the "heightened prejudice" proposal is that in some of the cases no appellate record is prepared or filed. No records are

prepared for cases in which late notices of appeal are processed by the juvenile court under rule 8.406(c) of the California Rules of Court. Some of the project administrators do not have digital access to the juvenile court file.[4] Asking the court to evaluate the merits of Petitioner's appeal, without an appellate record, is problematic.

The *Cathina W.* court received the very same request for a heightened prejudice showing while facing a similar issue (mother's failure to comply with the mandatory writ-review process), and rejected it. The court observed:

> We will not impose such a condition upon the mother's right to appellate review of the merits of the setting order. Under respondent's argument, as we understand it, we cannot evaluate the merits of the setting order unless we find that the order was the result of prejudicial error by the juvenile court and, consequently, that a writ reversing the order would have issued had the mother filed a timely and proper rule 39.1B petition. However, a determination that the setting order was infected with prejudicial error obviously requires an evaluation of the merits of the order. We therefore do not see any purpose to be served by adopting the rule advocated by respondent."

(*In re Cathina W.*, *supra*, 68 Cal.App.4th at p. 724.)

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In the Second District, the appellate project has digital access to the juvenile court file. The appellate projects for the Third, Fourth and Fifth Districts do not have digital access to the juvenile court file. In the Fourth District, records were not filed in approximately half of the cases in which a late notice of appeal was filed from a section 366.26 hearing.

According to Respondent, the "heightened prejudice" proposal is advanced as a way to ensure that the parent's interest in appellate review "does not trump the state's and the minor's compelling interest in stability and permanency." (Respondent's Reply to Minor's Brief, p. 7.) Respondent and the Minor do not dispute a minor's interest in the finality of the proceedings gives way to the processing of a *timely* appeal. They do not explain how the three-day filing delay in Petitioner's case further prejudiced the Minor's interests.

As a party to the noticed motion procedure for presenting a constructive filing claim, the Minor will have an opportunity to assert her interests and demonstrate with specificity what they are. A heightened prejudice analysis is not necessary.

VI. A Noticed Motion Process Will Expedite Consideration of a Constructive Filing Claim; Habeas Corpus Will Not, and Offers No Additional Protection for Safeguarding the Parties' Respective Interests.

Allowing for constructive filing of a notice of appeal from an order terminating parental rights ensures, at a minimum, the parent will have access to the appellate courts, even though relief may not be granted. That minimum access can be expedited by the motion procedure for seeking constructive filing of a notice of appeal.

Minor's counsel takes no position on whether the court should require a noticed motion or a writ of habeas corpus, but Respondent asserts habeas is the proper procedure to raise this limited issue. (Respondent's Response to Minor's Brief on the Merits, p. 13.) The focus on the more involved habeas procedure offers no additional safeguards but could slow the review of this issue considerably. Respondent contends Petitioner must assert the failure to timely file a notice of appeal by a habeas petition but provides no cite to any legal authority. (RBM, p. 40.)

In the criminal law, the constructive filing claim is raised in either a habeas petition (*In re Benoit*, *supra*, 10 Cal.3d at p. 78) or a noticed motion procedure (*People v Zarazua* (2009) 179 Cal.App.4th 1054, 1062). The procedure preferred by the appellate courts varies. The Second, Third, and one of the three divisions of the Fourth District prefer a noticed motion. The

Fifth District along with the remaining two divisions (second and third) of the Fourth District request habeas petitions.

Amici advocate for a noticed motion procedure. (Cal. Rules of Court, rule 8.54.) A noticed motion has the same protections a habeas petition offers, but is far more expedient. The motion procedure allows the parties opposed to the application to respond and present evidence supporting their opposition. (Cal. Rules of Court, rules 8.54,(a)(3).)

That a noticed motion would serve to expedite the court's consideration of the application for constructive filing is illustrated by significant delay the habeas proceedings created the *In re Kristin H.*, *supra*, 46 Cal.App.4th 1635.

In *Kristin H.*, mother filed a petition for a writ of habeas corpus in which she contended she did not receive effective representation because her attorney did not call witnesses on her behalf and did not submit an independent psychiatric evaluation that rebutted the psychiatric conclusions on which the court based its orders. (*Id.* at p. 1649.) Though a petition for extraordinary relief must be filed within a reasonable time, the habeas petition in *Kristin H.* was filed seven months after the disposition hearing. (*Id.* at p. 1658.) After the appellate record was filed, the opening brief was filed two months later. (*Ibid.*) Once the appellate appointment was expanded to include the filing of a habeas petition, it was another three

months before the habeas writ was filed. (*Id*. at p. 1659.) After considering the timeliness issue, the court found these circumstances did not justify dismissing the petition as untimely. (*Ibid*.)

The complexity of the issue posed in *Kristin H*., trial counsel's effectiveness at the disposition hearing, perhaps justified the delay in that case. But such delay would not be tolerable for presenting a constructive filing claim from a Welfare and Institutions Code section 366.26 appeal.

The facts necessary to support the application for constructive filing will for the most part not be in the appellate record because the relevant events will have taken place after the hearing from which the appeal is taken. Declarations from the parties involved would supply the necessary evidence. The party opposing the request will have 15 days to respond. (Cal. Rules of Court, rule 8.54(a)(3).)

The noticed motion procedure will help prevent delay in presenting and litigating the constructive filing claim. It will provide the court with the information it needs to assess the claim and balance the respective interests of the parties.

CONCLUSION

Whether grounded in the criminal or juvenile law, Petitioner's case presents the necessary elements for relief: the three-day filing delay was trial counsel's sole responsibility; Petitioner satisfied her obligation to make her wish to appeal known to trial counsel; the three-day delay was not so significant to have impaired the Minor's interest in permanency and stability. There is no dispute a minor's interest in the finality of the proceedings gives way to the processing of a *timely* appeal. A bright-line rule denying relief in all cases does not balance the respective interests of the parties; it denies a parent any remedy for counsel's mis-step in a case that irrevocably terminates parental rights.

Anecdotal information indicates this issue presents in very few appeals from the termination orders. The project administrators already screen notices of appeal for timeliness. They will assess cases under the guidelines proposed by this Court, and file applications for constructive filing relief when appropriate. In cases that merit consideration the parties will present their case and advocate their respective interests. In classic dependency fashion, the court will weigh the interests of the parties to decide whether constructive filing should be granted. In this case-by-case approach, the minor's interests are heard and are therefore protected.

The parent is not automatically denied a remedy for counsel's mis-step, and is granted access to the court.

Date: October 7, 2020

Respectfully submitted,
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CERTIFICATION OF WORD COUNT

I, Linda Fabian, hereby certify that, according to the WordPerfect computer program used to prepare this document, Brief of Amici Curiae contains 6,909 number of words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed October 7, 2020 in San Diego, California.

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PROOF OF SERVICE BY ELECTRONIC SERVICE &
SERVICE BY U.S. MAIL

Case Name: ***Alameda County Social Services Agency v. M.B.***
Court of Appeal No. **A158143**
Superior Court No. **JD-028398-02**

I, Freida Aguilar, declare that I am over 18 years of age, employed in the County of San Diego, and not a party to the instant action. My business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939. My email address is eservice-court@adi-sandiego.com.

I served the attached **California Appellate Projects' Application to File Amicus Curiae Brief and Proposed Amicus Curiae Brief in Support of Objector/ Appellant M.B** and **Appellate Projects' Proposed Amicus Curiae Brief in Support of Objector / Appellant M.B.** as follows:

USPS: I placed true copies of the California Appellate Projects' Application to File Amicus Curiae Brief and Proposed Amicus Curiae Brief in Support of Objector/ Appellant M.B in a sealed envelope, with the correct postage, and deposited them in the United States Postal Service on , October 7, 2020 addressed to each of the following persons:

Office of the County Counsel,
County of Alameda
1221 Oak Street, Suite 450
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ELECTRONIC SERVICE (TRUEFILING): I served the California Appellate Projects' Application to File Amicus Curiae Brief and Proposed Amicus Curiae Brief in Support of Objector/ Appellant M.B via TrueFiling service on October 7, 2020.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

This declaration was executed at San Diego, California, on October 7, 2020.

/s/ Freida Aguilar
(Signature)
Freida Aguilar

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **IN RE A.R.**
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Lower Court Case Number: **A158143**

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Date

/s/Freida Aguilar
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Defenders, Appellate (Pro Per)
Last Name, First Name (PNum)

Appellate Defenders, Inc.
Law Firm