IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re A.R., A Person Coming Under the Juvenile Court Law.	Supreme Court Case No. **S260928**
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Petitioner and Respondent, vs. **M.B.**, Objector and Appellant.	Court of Appeals Case No. A158143 Alameda Superior Court Case No. JD-028398-02

After an Unpublished Order by the Court of Appeal for the First Appellate District, Division One, Filed January 21, 2020

Affirming an Order of the Superior Court of Alameda County Superior Court, Honorable Charles Smiley, III

RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Welfare and Institutions Code

Rules

Other Authorities

I. INTRODUCTION

Respondent Alameda County Social Services Agency ("Agency") submits this consolidated answer to the three amicus curiae briefs[1] filed in support of Petitioner. Amici curiae all argue that the Court should allow a parent in a juvenile dependency case 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.[2] Amici curiae assert that to allow such a challenge, this Court should expand the constructive filing doctrine to apply to a parent who, before the deadline of the appeal, instructs her appointed counsel to file a notice of appeal from an order terminating her parental rights and was diligent in ensuring that the notice was filed.

The amici curiae briefs focus on a parent's fundamental right to a relationship with their child and assert that even when there is not a timely filed notice of appeal, a termination of parental rights should be adjudicated on the merits if a court finds that it was "constructively filed." It may be easy for amici curiae to argue about the application of the constructive filing doctrine to dependency proceedings after parental rights have been terminated in the abstract. However, the Agency must remind this Court

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[1] Three amicus curiae briefs were filed. The Committee of the California Commission on Access to Justice brief will be identified as CCCAJ Brief, the California Academy of Appellate Lawyers' brief will be identified as the CAAL Brief, and the California Appellate Projects' brief will be identified as the CAP Brief.

[2] All Code section references hereafter will be to the California Welfare and Institutions Code, and all Rule references will be to the California Rules of Court, unless otherwise indicated. OCT refers to the Clerk's Omission Transcript from Appeal No. A158143. 1 CT refers to the first volume of the Clerk's Transcript. 2 CT refers to the second volume of the Clerk's Transcript. RT refers to the Reporter's Transcript.

that at the center of this litigation is a four year old child with a history of trauma and is finally stable in the only home she has ever known who has been waiting, now over eighteen months, to be adopted.

Amici curiae fail to consider the compelling rights of the state and the minor and the overriding purposes of dependency law. The Legislature has made clear that the primary purpose of the dependency scheme is to center each and every dependent minor's best interests. At each stage of the proceedings, the juvenile court must consider how its orders further that particular minor's best interests given the facts of the case. The Legislature has also made clear that at the time that a juvenile court terminates a parent's rights, the focus is not on the parent's interests but rather on the permanency and stability of the minor. The concept of the constructive filing doctrine is not a novel one, and yet, the Legislature has not seen fit to allow for a parent to obtain relief from default when a timely notice of appeal has not been filed. Accordingly, this Court must also consider how a sea change in dependency law would affect dependent minors' best interests. Due to the compelling interests of finality, stability, and permanency for a minor, when a parent's counsel fails to file a timely notice of appeal after the termination of parental rights, their appeal must be dismissed.

If this Court were to allow a parent to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights, it must require both a prima facie showing of due diligence and a prima facie showing of ineffective assistance of counsel which includes a showing of prejudice as articulated in *In re Kristin H.* (1996) 46 Cal.App.4th 1635 (*Kristin H.*).

II. DEPENDENCY PROCEEDINGS ARE SPECIAL PROCEEDINGS AND ANY CHANGES TO DEPENDENCY LAW MUST SERVE THE MINOR'S BEST INTERESTS

When assessing whether to import a judicially created legal fiction derived from criminal law into dependency law, one must be mindful of the differences between the two. "Dependency proceedings in the juvenile court are special proceedings governed by their own rules and statutes." (*In re Nicole S.* (2019) 39 Cal.App.5th 91, 103, review denied (Dec. 18, 2019).) Dependency proceedings are part of a comprehensive statutory scheme geared toward expediency, largely to serve the dependent child's best interests. (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 635 [*citing In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152].) "The goal of dependency proceedings, both trial and appellate, is to safeguard the welfare of California's children. 'The objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide permanent, stable homes if those children cannot be returned home within a prescribed period of time.' [Citation.] ... The best interests of the child are paramount. [Citations]." (*In re Nicole S., supra,* 39 Cal.App.5th at p. 105 [citing *In re Josiah Z.* (2005) 36 Cal.4th 664, 673].) "The Legislature has made known its desire not to allow the child's future to be held hostage to a postponed appeal." (*In re Meranda P., supra,* 56 Cal.App.4th at p. 1156.)

"Responding to evidence that children were languishing in foster care, the Adoption and Safe Families Act of 1997 (ASFA, Public Law 105-89) marked a turning point in child welfare policy, making permanency and adoption as important a priority for children in foster care as the traditional mission of ensuring safety and security for these children.

However, despite this renewed focus on permanency and the resulting increase in adoptions since 1997, nearly half of children continue to reside in foster care for more than 18 months, and many, for years." (David M. Rubin, MD, Amanda O'Reilly, MPH, Xianqun Luan, MS, and A. Russell Localio, Pediatrics. 2007 Feb; 119(2): 336-344, "The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care" https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2693406/ (last visited October 28, 2020.) "Children with unstable placements had twice the odds of having behavior problems as children who achieved early stability at every level of risk for instability." (*Id.*) "[P]lacement stability, independent of a child's problems at entry into care, can influence well-being for children in out-of-home care." (*Id.*)

Thus, it is imperative that when parental rights have been terminated, a permanent plan is achieved as quickly as possible. "Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) Achieving finality when a minor is in a stable, loving, permanent placement is a compelling state interest that does not exist out of the dependency scheme. That is exactly why the constructive filling doctrine may make sense in different contexts, but not in juvenile dependency. Not when it may jeopardize a likely already fragile minor's sense of security.

Amicus California Appellate Projects asserts that untimely notices of appeal are only filed in a small number of dependency appeals and provides numbers of late filed appeals from the Fourth District over a two year period. (CAP Brief at 26-27.) However, the number of minors affected should make no difference in the analysis. The state has a duty to each and

every one of those approximately 300[3] dependent minors to safeguard their stability and permanency. (*See In re Marilyn H.* (1993) 5 Cal.4th 295, 307 ["Although a parent's interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect."].) That duty is a compelling state interest that prevents the application of the constructive filing doctrine in dependency.

Moreover, California Appellate Projects' speculation that the minor would be unaware of the delay is preposterous. (CAP Brief at 23.) While amicus curiae may have "considerable knowledge and experience advocating for persons who have filed late notices of appeal in the criminal, juvenile, and limited civil settings" (CAP Brief at 6) they quite clearly do not have experience being a child welfare worker or dependency attorney at the trial level. As the facts of the underlying litigation make quite clear, oftentimes the minor is acutely aware that they have yet to achieve permanence.

Pursuant to Section 366.3, subdivision (a), while the appeal is pending, the juvenile court retains jurisdiction over the child and must continue to hold hearings every six months "to ensure that the adoption or legal guardianship is completed as *expeditiously* as possible." (Section 366.3(a) (emphasis added).) At each Section 366.3 review hearing, the court shall make findings and orders pursuant to Section 366.3, subdivision (g). The Agency in turn has obligations pursuant to that subdivision and

[3] If California Appellate Projects' numbers are representative of the five other appellate districts.

must continue to meet with the minor monthly. (Section 366.3(g); Section 16516.6.) While this particular minor may only be four years old, it should not be assumed that a child who has previously made a statement concerning her placement pursuant to Section 361.5, subdivision (g)(1)(E), gets monthly visits from a child welfare worker who is statutorily mandated to have a private discussion with the child, and continues to have juvenile court hearing dates, is unaware of the pending litigation.

Petitioner's parental rights were terminated on June 12, 2019. (2 CT 423-25.) In the Agency reports prepared for the Section 366.26 hearings, the Agency reported that the minor appeared to feel some uncertainty about moving back and forth between houses, and that the minor would follow the caregiver from room to room. (1 CT 193.) Following visits with Mother, the minor was dysregulated, would use curse words, scream, and hit. (2 CT 404.) The visits appeared stressful for the minor and she was clingy with the caregivers after they would pick her up. (2 CT 405.) The Agency opined that these behaviors indicated that the minor needed security and permanence. (2 CT 405.) The minor has yet to achieve that security and permanence through adoption nearly eighteen months later. If a parent were able to challenge ineffective assistance of counsel after the termination of her parental rights using the constructive filing doctrine, there may be hundreds of minors with delayed permanence also experiencing behavioral and attachment issues. Because applying the constructive filing doctrine in juvenile dependency has detrimental effects on the well-being of dependent minors, this Court should decline to allow a parent to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights.

III. BECAUSE CHALLENGES CONCERNING INEFFECTIVE ASSISTANCE OF COUNSEL IN DEPENDENCY PROCEEDINGS ARE BASED IN STATUTE, THIS COURT SHOULD NOT EXPAND THAT RIGHT IN THE ABSENCE OF LEGISLATIVE ACTION

As this Court referenced *In Kristin H.* (1996) 46 Cal.App.4th 1635, in the questions it granted review, it is imperative one looks to the *Kristin H.* court's analysis. In *Kristin H.*, the court's holding that ineffective assistance of counsel was a cognizable claim in a dependency proceeding hinged on an interpretation of Sections 317 and 317.5 and not the Sixth Amendment of the United States Constitution. (*Kristin H., supra,* 46 Cal.App.4th at p. 1642.) At the time of the decision, Section 317.5 was recently enacted and provided, "that parties who are represented by counsel at dependency proceedings 'shall be entitled to competent counsel.'" (*Id.*; Section 317.5.) The *Kristin H.* court considered the nature of that statutory right and held that by including Section 317.5 and due to the recognition that dependency proceedings may "work a unique kind of deprivation" and implicate a parent's "fundamental liberty interests" in maintaining the parent-child relationship and the child's "fundamental independent right" in being part of a family unit, the Legislature intended to include a right to judicial review of claims of incompetence of counsel. (*Kristin H., supra,* 46 Cal.App.4th at p. 1642.) The *Kristin H.* court's recognition that parents in a dependency proceeding have a right to challenge claims of incompetence of counsel based in statute, not in constitutional due process principles (*Id.* at 1659), is an important distinction between dependency and criminal law. The difference prompted a different analysis of the statutory directive that parents be provided competent counsel and the court's conclusion found support in the legislative history. (*Id.* at 1663.)

In contrast, Petitioner and amici curiae seek to expand a parent's right to challenge incompetence of counsel post termination of parental rights through the constructive filing doctrine – a judicially created legal fiction. The Legislature is extremely active in fine tuning California's dependency scheme, which is "ever-evolving." (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedures (2020) § 2.12[5] (Seiser & Kumli). "[E]ach year this area of the law will continue to see a multitude of legislative changes and published appellate decisions." (*Id.*) As noted by California Appellate Projects, for decades the Legislature has adopted laws to protect the minor's need for permanence and eliminate delays. Applying the constructive filing doctrine after a court has terminated parental rights would only frustrate those purposes.

Moreover, the constructive filing doctrine is not new. *In re Benoit* (1973) 10 Cal.3d 72, which has been addressed extensively, was decided in 1973, well before the Legislature enacted Section 317.5, to ensure that parents have a right to challenge claims of incompetent counsel. Considering that the dependency scheme is ever evolving due to continuous legislative changes, the Court should be cautious in expanding a judicially created doctrine that the Legislature has not seen fit to address by statute. Especially when, as here, the parent seeks to make the ineffective assistance of counsel challenge *after* parental rights have terminated. "In such cases the point may have been reached 'at which the interests of the child and parent collide, and at which the child's interest in finality prevails.'" (*Kristin H., supra,* 46 Cal.App.4th at p. 1664 [citing *In re Issac J.* (1992) 4 Cal.App.4th 525, 532; *In re A.M.,* (1989) 216 Cal.App.3d 319, 322; *Cynthia D. v. Superior Court,* (1993) 5 Cal.4th 242, 254.) The Agency, the

Minor, and the published cases that have addressed this issue, agree that the minor's interests in finality, stability, and permanence outweigh the interest of the parent in challenging an ineffective assistance of counsel claim after the termination of parental rights.

IV. IN DEPENDENCY PROCEEDINGS MERITORIOUS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS REQUIRE A *PRIMA FACIE* SHOWING OF PREJUDICE

If this court were to allow a parent to challenge ineffective assistance of counsel after the termination of parental rights and prolong uncertainty for a dependent minor, it must at a minimum require due diligence[4] and import the legal standard from *Kirstin H.* and its progeny. The *Kirstin H.* court held that a parent who makes an ineffective assistance of counsel claim must satisfy a two-part test. First, the parent must show that "counsel failed to act in a manner to be expected of reasonably competent attorneys practicing in the field of juvenile dependency law." (*Kristin H., supra,* 46 Cal.App.4th at p. 1668.) Second, the parent must establish that the claimed error was prejudicial. (*Id.*)

The court held that because the right to counsel in dependency is a statutory right, a violation is properly reviewed under the harmless error test enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Id.*, citing *In re Justin L.* (1987) 188 Cal.App.3d 1068, 1077 [concerning statutory right to self-representation]; *In re Nalani C.* (1988) 199 Cal.App.3d 1017; *In re Ronald R.* (1995) 37 Cal.App.4th 1186; *In re Malcolm D.* (1996) 42

[4] The Agency adopts and incorporates its arguments regarding due diligence, and that Petitioner has failed to show due diligence in this case, from its Answer Brief on the Merits and its Response to Minor's Merits Brief pursuant to Rule of Court 8.200(a)(5).

Cal.App.4th 904, 919.) Thus, the parent must demonstrate that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.) As the *Kristin H.* court stated explicitly, a parent must demonstrate "a more favorable result." It is clear that the court was addressing an assessment of the merits of the case, because that is exactly what it did when addressing the mother's claim; it assessed the *merits* of the case and concluded that the mother had made a prima facie showing. (*See Kristin H., supra,* 46 Cal.App.4th at p. 1672.)

While the California Appellate Projects seemingly agree that a parent must show prejudice, they then posit that the only prejudice that Petitioner must show is that "she was not at fault for the late notice of the appeal" and that "[n]o more should be required of her." (CAP Brief at 20-21.) Later in their brief, while citing to criminal cases concerning the constitutional right to counsel, they assert that the Agency's and Minor's position that a parent must show it is reasonably probable that she would secure a favorable result in her appeal on the merits is not required. This argument has no merit precisely because this is a dependency proceeding and not a criminal one. Put another way, the heightened standard that the Agency and the minor submit is required if a challenge is allowed is simply the state of the law concerning ineffective assistance of counsel claims in dependency proceedings.

The Committee of the California Commission on Access to Justice ("CCCAJ") insist that the caselaw applying the constructive filing doctrine only includes one necessary condition; that the putative appellant took affirmative steps to have a notice of appeal filed, but due to circumstances

out of their control it was not filed by the deadline. (CCCAJ Brief at 16.) CCCAJ asserts that this one necessary condition in addition to other "variant" conditions, permit the constructive filing of a notice of appeal. These "variant" conditions include: self-represented person held in criminal custody; an appellant who gave timely instruction to his lawyer to appeal a criminal conviction; or a state actor led the appellant to believe his appeal would be timely. (CCCAJ Brief at 16-17.) CCCAJ proposes an additional "variant" condition – "in order to do justice." (*Id.* at 17.) The Agency does not agree with CCCAJ's characterization of the constructive filing doctrine. However, if this Court were to consider adopting CCCAJ's reasoning that the constructive filing doctrine could apply "in order to do justice", it must consider whether it is reasonably probable that the appeal would be successful. Any other standard and the constructive filing doctrine denies justice for the minor by delaying permanence and jeopardizing stability when there is no merit to the putative appeal.

Instead of just showing that the parent was not at fault for the alleged error as amici curiae suggest, the parent must show "reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding* would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 261, citing *Strickland v. Washington* (1984) 466 U.S. 668, 694 (emphasis added); *see also In re N.S.* (2020) 55 Cal.App.5th 816; *In re N.M.* (2008) 161 Cal.App.4th 253, 270.) For example, in *In re Ernesto R.* (2014) 230 Cal.App.4th 219, a mother challenged the court's termination of her parental rights and asserted an ineffective assistance of counsel claim because her attorney failed to file a

Section 388 petition for additional reunification services. The Second District appellate court held that "[t]o prevail on the claim, appellant must show that counsel's representation fell below an objective standard of reasonableness and resulting in prejudice, *i.e.*, had a section 388 petition been filed, it is reasonably probable that it would have been granted." (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) That is exactly the standard that the Agency and the Minor propose, if a parent is permitted to challenge counsel's failure to file a timely notice of appeal from an order terminating her parental rights. To prevail on the claim, the parent must both show that counsel's representation fell below an objective standard of reasonableness *and* resulting prejudice, *i.e.,* had a timely notice of appeal been filed it is reasonably probable that the appeal would succeed on the merits.

Moreover, when addressing ineffective assistance of counsel claims, the court "need not examine whether counsel's performance was deficient before examining the issue of prejudice; instead, [the court] may reject a claim of ineffective assistance of counsel if the parent does not show the result would have been more favorable but for trial counsel's failings." (*Id.*; *In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.) As detailed in the Agency's Answer Brief on the Merits, Mother cannot make a prima facie showing that her appeal would be been meritorious. Mother seeks to appeal both the failure of the court to hold a hearing on her Section 388 petition and the terminating of her parental rights. Mother's claims regarding the Section 388 petition are factually incorrect (6/12/19 RT 1-3) and therefore have no merit. Mother's argument that the court should have applied the beneficial relationship exception to the termination of parental

rights likewise fails, as Mother neither consistently visited with the minor (*see e.g.*, 1 CT 189; 2 CT 404), nor was there a showing that Mother and the minor had a positive emotional bond. (*See e.g.*, 1 CT 188, 191, 193; 2 CT 404.) Thus, if this court were to determine that a parent in a juvenile dependency case has the right to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights, the appellate court can first assess the merits and determine that an ineffective assistance of counsel claim would fail and deny the parent's writ.

V. CONCLUSION

This Court must affirm centuries-old precedent and sound public policy and continue to hold that a failure to file a timely notice of appeal is jurisdictional and thus, an untimely notice of appeal is fatal to a parent's claim. If, in the alternative, the Court permits a parent to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights, it must require, a habeas petition with a showing of prejudice as required by *In Kristin H.* (1996) 46 Cal.App.4th 1635.

DATED: November 12, 2020

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CERTIFICATE OF WORD COUNT

I, Samantha Stonework-Hand, Senior Deputy County Counsel, certify under penalty of perjury that, according to the computer program Microsoft Word 2016, with which this Answer was produced, the response contains approximately 3,717 words.

Executed on November 12, 2020, in Oakland, California.

By: /s/ Samantha N. Stonework-Hand
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DECLARATION OF SERVICE

I, Frances Chen, declare, I am employed in the County of Alameda, State of California, over the age of 18 years and not a party to the within case. My business address is 1221 Oak Street, Suite 450, Oakland, CA 94612.

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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 to the best of my knowledge.

Executed at Oakland, California, on November 12, 2020.

/s/ *Frances Chen*

Frances Chen

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **IN RE A.R.**
Case Number: **S260928**
Lower Court Case Number: **A158143**

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/s/Frances Chen

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Office of the Alameda County Counsel

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