IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S OPENING BRIEF ON THE MERITS

After the Unpublished Order by the Court of Appeal
First District, Division One
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QUESTIONS PRESENTED

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[1] 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].)

[1] All further statutory references are to the Welfare and Institutions Code, unless specified otherwise.

2. If so, what are the proper procedures for raising such a claim?

INTRODUCTION

At issue in this case is one of the most basic tenets of our judicial system: access to justice. This Court must determine whether indigent parents in juvenile dependency proceedings, who often have the fewest resources and who are facing the irreversible destruction of their relationship with their child, will be denied full access to the judicial system simply because their appointed counsel failed to timely file a notice of appeal despite agreeing to do so.

Mother contends that reason, justice, and fairness compel a conclusion that ensures a parent's fundamental rights are not infringed without a full and fair adjudication and appellate review of the juvenile court's decision. As Justice Ginsberg noted, "[w]e place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice'" recognizing that "parental termination decrees are among the most severe forms of state action." (*M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 105, 124.)

Parents have an interest in the accuracy and justice of the juvenile court's decision to terminate parental rights. Their right to appeal a juvenile court's dispositional orders and all subsequent orders, including from the termination of parental rights, is vital to the integrity of the juvenile dependency system. The "state's exclusive power to initiate a dependency proceeding

does not equate to an exclusive interest in the outcome of the proceeding." (*In re Lauren P.* (1996) 44 Cal.App.4th 763, 770.)

In the criminal context, the constructive filing doctrine was originally developed to protect incarcerated pro per defendants from state interference of the right to appeal the judgment in their criminal cases. Over the years, this Court has significantly expanded the doctrine. First, to criminal defendants whose efforts to appeal were frustrated by the negligence of their own trial attorneys, and then to incarcerated pro per defendants pursuing appeals in medical malpractice civil suits. The doctrine has even been extended to protect the People's right to appeal a court's decision.

Appellate courts now routinely grant relief under the constructive filing doctrine to criminal defendants who are able to establish 1) diligence in requesting that their trial attorney file a notice of appeal for them, 2) justifiable reliance on their attorney's promise to file a notice of appeal, and 3) ineffective assistance of counsel in failing to timely file the notice of appeal. However, despite the fundamental rights at stake, the door to equal justice has been bolted shut to parents in juvenile dependency proceedings who are capable of making the same showing.

As this Court noted in *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, the constructive filing doctrine may be extended when "there are compelling reasons to do so" to ensure "equality of access to our courts." (*Id.* at pp. 121, 128.) It is important to note that the goal of the doctrine has never been to

extend the time to file a notice of appeal. Rather, its focus has been to "redefine the point at which notice is deemed filed" in line with reason, fairness, and justice. (*Id*. at p. 126.)

Parents, children, and the state share a compelling interest in the accuracy of the juvenile court's decision at the section 366.26 hearing. Extending the protections of the constructive filing doctrine to parents in juvenile dependency proceedings will ensure that a decision by the state to deprive a parent of their fundamental interest in the care, custody, and control of their child is free from prejudicial error. Similar to litigants in other types of proceedings, parents in juvenile dependency proceedings are entitled to adequate, effective, and meaningful access to the appellate courts. Disallowing reliance on the constructive filing doctrine in the dependency context cannot be reconciled with this right.

It is no less reasonable for parents in dependency proceedings to rely on their attorneys to follow through on their promise to file a timely notice of appeal than it is for criminal defendants to do the same. Therefore, this Court should hold that the constructive filing doctrine applies when a parent in a juvenile dependency proceeding asks their attorney to file a notice of appeal from the order terminating parental rights within the sixty-day requirement, the attorney agrees to do so, but then fails to carry out this simple task.

STATEMENT OF FACTS

1. The Agency filed a section 300 petition, A.R. was adjudged a dependent of the court, and returned to mother with family maintenance services.

On June 20, 2017, the Alameda County Social Services Agency (hereinafter "Agency") filed a section 300 petition pursuant to subdivisions (b) [failure to protect] and (g) [no provision for support] on behalf of then ten-month-old A.R. (Aug CT 4.) At the time the petition was filed, mother was seventeen years old and previously had been a dependent child herself.[2] (Aug CT 6, 12.) A.R. was detained and placed in foster care. (Aug CT 17, 27.)

An amended petition was sustained on September 21, 2017, and A.R. was found to be a person described by section 300, subdivision (b). The amended petition stated mother had mental health concerns, such as depression, that affected her ability to provide regular care, supervision, and protection for her daughter. On or about June 14, 2017, mother attempted suicide by taking pills while the child was in the home with the maternal great-grandmother and was subsequently hospitalized. (Aug CT 114-117.) The court adjudged A.R. a dependent of the court and returned her to mother's care with family maintenance services. (Aug CT 118-119.)

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[2] Mother's own dependency case was terminated on December 29, 2011, when mother was eleven years old, and she was placed in a legal guardianship with her maternal grandmother. (Aug CT 12.)

2. A section 387 petition was filed, A.R. was detained, and mother received family reunification services.

On February 13, 2018, the Agency filed a section 387 supplemental petition stating the previous disposition had not been effective in protecting the child. (1CT 11-12.) Specifically, the petition alleged that on January 5, 2018, mother contacted the social worker and stated, although it was a difficult decision, she could not continue caring for A.R. and finish high school. Mother was in the eleventh grade and had not been able to fully participate in her family maintenance case plan objectives due to her school responsibilities. A.R. was detained on February 14, and continued in her placement with her former foster mother. (1CT 33; 2/21/19 RT 5.)

The juvenile court found the section 387 petition to be true at the February 28, 2018 jurisdictional hearing and family reunification services were ordered for mother. (1CT 81-82; 2/28/18 RT 5, 7.)

At the time of the six-month review hearing in October 2018, the Agency recommended terminating reunification services to mother. (1CT 132.) At the review hearing, new counsel was appointed to represent mother.[3] Counsel requested a continuance, which was granted. (1CT 138-139; 10/2/18 RT 3.) In discussing the request for a continuance, the juvenile court noted:

[3] The contract between Juvenile Dependency Counselors and the Judicial Council expired on August 31, 2018. East Bay Family Defenders was awarded the contract beginning September 1, 2018. (1CT 125, 128.)

> So I, of course, want your clients to be properly represented, but I know it's just not this Court but all the Dependency Courts are having problems.
> We were told when you got the contract, and instead of JVC [sic], they had lawyers for this particular department. They were scattered sometimes. We were told that lawyers would be specifically assigned to this department. And I hear on a daily basis that lawyers may have to cover two courts. Lawyers may have to cover three courts.

(10/2/18 RT 6.)

The matter was continued to October 17, 2018. At that hearing, after the court found reasonable services had been provided and mother's progress had been minimal, it terminated reunification services to mother. (1CT 140-141; 10/17/18 RT 20.) Visitation was ordered to continue as frequently as possible consistent with A.R.'s well-being. (1CT 141.)

Mother filed a petition for extraordinary writ contending the Agency failed to comply with the notice requirements of the Indian Child Welfare Act. Division One of the First District Court of Appeal denied the petition on the merits (A155682). (1CT 174-181.)

3. Mother's parental rights were terminated at the section 366.26 hearing.

The Agency's February 6, 2019 section 366.26 report recommended the matter be continued for thirty days for a Child and Family Team Meeting to finalize the permanent plan. (1CT 184.) The Agency submitted an addendum report dated February 6, 2019 which stated that a Child and Family Team meeting was held on January 25, 2019 and, "after much discussion," mother,

who had appeared at the meeting without counsel, reportedly had agreed with adoption. (1CT 248.)

At the February 6, 2019 hearing, counsel for mother requested a continuance expressing her concerns about the Child and Family Team meeting and stating mother was not in agreement with adoption. The court found good cause for a continuance. (2/6/19 RT 3.) The court ordered the visits every other weekend to continue and for the Agency to provide mother and A.R. with one additional day per month of visitation. (1CT 279; 2/6/19 RT 7.)

On April 8, 2019, mother filed a request for change of court order pursuant to section 388 seeking return of A.R. or reinstatement of family reunification services. (2CT 369-370.) The petition alleged that mother had developed positive support systems with friends and family, participated in medical/ psychological treatment, including individual counseling, showed that she knew age-appropriate behavior for her child, practiced safety planning during a moment of crisis, and participated in a parenting education course. The petition argued that A.R. was bonded with her mother and extended maternal family and that it was in her best interests these bonds be preserved. (2CT 370.)

On April 17, 2019, the court ordered an evidentiary hearing on mother's petition. (2CT 390; 4/17/19 RT 11-12.)

The Agency submitted a memorandum dated June 12, 2019 recommending mother's petition for modification be denied and parental rights be terminated. (2CT 409, 413-414.)

Mother was not present[4] at the June 12, 2019 hearing but was represented by counsel.[5] (6/12/19 RT 1.) After hearing argument, the court denied mother's petition for modification, identified adoption as the permanent plan for A.R., and terminated mother's parental rights. (2CT 428-430; 6/12/19 RT 3, 7, 9-10.) The court stated the order could be appealed by filing a notice of appeal within sixty days and counsel for the parent "shall be deemed discharged at the expiration of the time allowed for appeal."[6] (6/12/19 RT 10.)

4. *Mother's efforts to appeal the juvenile court's decision terminating her parental rights.*

Soon after the June 12th hearing, mother contacted her social worker at East Bay Family Defenders to inquire as to the outcome of the hearing. (Declaration of Mother attached to Appellant's Application for Relief from Default Filed in the Court of Appeal on December 27, 2019 (hereinafter Mother's

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[4] Mother had been either present or available by phone for the prior section 388 and section 366.26 hearings. (2/6/19 RT1, 1CT 279; 3/19/19 RT 1; 3/20/19 RT 1, 2CT 345; 4/8/19 RT 1 [not present because at school but available by phone], 2CT 386; 4/17/19 RT 1, 2CT 391; 4/29/20 RT 1. 2CT 395.)

[5] That day, mother informed her counsel's supervisor that she could not attend the hearing due to a severe asthma attack. Mother then rushed to the emergency room at Highland Hospital in Oakland, California where she received a treatment to stabilize her breathing. (Mother's Declaration.)

[6] There was no mention in the record on appeal that mother was informed in writing of her right to file a notice of appeal. (Cal. Rules of Court, rule 5.590(a) [if parent is not present at a contested hearing, the advisement of right to appeal must be made by the clerk of the court by first-class mail to the last known address of the party or by electronic service].)

Declaration).) Mother was told her parental rights were terminated and that she had a right to appeal that decision. Mother then contacted her court-appointed attorney and informed her attorney that she wanted to appeal the juvenile court's order. (*Ibid.*)

Mother's court-appointed attorney was informed on June 17, five days after the section 366.26 hearing, that mother wished to appeal from the juvenile court's findings and orders. (Declaration of Rita Rodriguez attached to Appellant's Application for Relief from Default filed in the Court of Appeal on December 27, 2019 (hereinafter Counsel's Declaration).) It was counsel's usual practice to file a notice of appeal within one or two days of learning of a client's desire to appeal and she assumed she had done so. Unfortunately, despite mother's request, her court-appointed attorney forgot to file the notice of appeal within the sixty-day statutory time limit. (*Ibid.*)

On August 14, 2019, mother's court-appointed attorney realized she had failed to file the notice of appeal as requested. She filed the notice of appeal the next day, three days after the statutory deadline. (Counsel's Declaration.) The notice of appeal was lodged with the Court of Appeal on August 23, 2019 and assigned case number A158143. The record on appeal was prepared and filed with the Court of Appeal on October 29, 2019, and appellate counsel was appointed to represent mother that same day. (https://appellatecases.courtinfo. ca.gov/search/case/dockets.cfm?dist=1&doc_id=2295478&doc_no=A158143&request_token=NiIwLSEmXkw4WzBRSSFNTE1IMEQ6UVxfJiBeQz5TQ

CAgCg%3D%3D (hereinafter *In re A.R.*, Court of Appeal Docket, A158143).)

On December 27, 2019, appellate counsel for mother filed an application for relief from default along with her opening brief, which raised issues relating to the denial of her section 388 petition for modification and the termination of her parental rights. On January 9, 2020, counsel for the Agency filed an opposition to mother's application for relief from default arguing that the appeal should be dismissed. (*In re A.R.*, Court of Appeal Docket, A158143.)

On January 21, 2020, the Court of Appeal denied mother's application for relief from default and declined to address the issues raised in mother's appeal stating,

> …[T]he notice of appeal was untimely because it was filed more than 60 days after the order appealed. (Cal. Rules of Court, rule 8.406(a)(1). She argues that she should be relieved from default because, through no fault of her own, her trial counsel inadvertently failed to file a notice of appeal…. Mother's application is denied. Mother relies on the principle that notices of appeal must be liberally construed, but none of the authorities she cites support extending the deadline to file a notice of appeal. Specifically, although mother does not explicitly rely on this ground, she is not entitled to relief based on the doctrine of constructive filing, under which a late filed notice of appeal will be deemed timely filed if the appellant is incarcerated and the delay results through no fault of his or her own. (See *In re Benoit* (1973) 10 Cal.3d 72, 86.) That doctrine generally does not apply in dependency cases, and the court declines to apply it here. (See *In re Ricky H.* (1992) 10 Cal.App.4th 552, 560; see also *In re A.M.* (1989) 216 Cal.App.3d 319, 322.) Because the notice of appeal was untimely, the court lacks jurisdiction, and the appeal is dismissed.

(*In re A.R.* Court Order, January 21, 2020, A158143.)

On February 5, 2020, mother filed a petition for rehearing arguing she was entitled to relief under the constructive filing doctrine, which was denied by the Court on February 7. (*In re A.R.*, Court of Appeal Docket, A158143.) On February 7, 2020, mother filed a petition for writ of habeas corpus in the Court of Appeal (A159518). (*In re M.B. on Habeas Corpus*, Court of Appeal Docket, A158143.)[7] On March 4, 2020, the Court denied mother's petition for writ of habeas corpus without prejudice to refile the petition in the Alameda County Superior Court. The Court stated mother had not demonstrated that she exhausted her habeas corpus remedy in the juvenile court prior to seeking relief from the Court of Appeal. (*Ibid.*) Mother filed, but did not serve, the petition for writ of habeas corpus on or about March 6, 2020 in the Alameda County superior court.

Mother's petition for review was filed with this Court on February 28, 2020 and was granted on May 15, 2020.

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[7] https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=1&doc_id=2311780&doc_no=A159518&request_token=NiIwLSEmXkw4WyBNSCJdXE1IIFQ6UVxfJiBOUztRMCAgCg%3D%3D

ARGUMENT

I. Parents In Juvenile Dependency Proceedings Are Entitled To Effective Assistance Of Counsel Including With Respect To The Filing Of A Timely Notice Of Appeal.

A. Due Process Protections Apply To Dependency Proceedings.

The goals of the California dependency system are to ensure the dual purposes of a child's safety, protection, and physical and emotional well-being and, when possible, to preserve and strengthen the family. (§§ 202, 300.2, 16501.1(a); *In re Jody R.* (1990) 218 Cal.App.3d 1615, 1623.) The juvenile court must balance the fundamental interests of a child in belonging to a family unit, of the right to be safe from abuse and neglect, and to have a stable, permanent placement (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306) with the fundamental rights of the parents to maintain their essential and basic right to the care, custody, management, and companionship of their children. (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 27.)

This Court has described dependency proceedings as "civil in nature" designed not to punish the parent but to protect the child. (See *In re Malinda S.* (1990) 51 Cal.3d 368, 384.)[8] The proceedings are non-criminal but they differ from civil actions as they affect the fundamental rights of parents and children. (*In re*

[8] Dependency proceedings are "special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code." (*In re Chantal S.* (1996) 13 Cal. 4th 196, 200; § 300 et seq.; Cal Rules of Court, rule 5.500 et seq.)

Kristin H., *supra*, 46 Cal.App.4th 1635, 1661-1662.) However, the adversarial nature of the proceedings cannot be overlooked.

> In most dependency matters the focus is against the parent and the prospect faced is the drastic result of loss of his child. Although legal scholars may deemphasize the adversary nature of dependency proceedings and characterize the removal of the child from parental custody as nonpunitive action in the best interests of the child, most parents would view the loss of custody as dire punishment.

(*Lois R. v. Superior Court* (1971) 19 Cal.App.3d 895, 901.) Furthermore, the reality is that the "state's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense." (*Santosky v. Kramer* (1982) 455 U.S. 745, 763.)

"California statutes and rules of court recognize the gravity of the possible deprivation involved in dependency proceedings and the importance of protecting the fundamental rights of parents and ensuring a fair and accurate adjudication." (*In re Kristin H., supra*, 46 Cal.App.4th at p. 1662.) "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 759.) Thus, the parent's interest in termination proceedings is "a commanding one." (*Lassiter v. Department of Social Services, supra*, 452 U.S. at p. 27.)

Because of the important rights at stake, including the fundamental liberty interest in retaining and maintaining the parent-child relationship, parents in juvenile dependency proceedings are guaranteed due process. (See *Lassiter v.*

Department of Social Services, supra, 452 U.S. at p. 27; *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 306.) This fundamental liberty interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." (*Santosky v. Kramer, supra,* 455 U.S. at p. 753.)

When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. (*Santosky v. Kramer, supra*, 455 U.S. at pp. 753-54, 102; see *Lassiter v. Dept. of Social Services, supra*, 452 U.S. at p. 33 [the Fourteenth Amendment imposes on the states the standards necessary to ensure that judicial proceedings are fundamentally fair].) Accordingly, parents have a due process right to present evidence, to cross examine witnesses, to a full and fair hearing on the merits, to notice, and to be heard in a meaningful manner. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 915*; In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1463.) A federal due process right to effective counsel also exists in those situations where the parent is threatened with termination of parental rights. (*Lassiter v. Dept. of Social Services, supra*, 452 U.S. at pp. 31-32.)

The legitimacy of the dependency system depends upon the application of due process as to all participants, especially in matters involving termination of parental rights. (*In re Malinda S.*, *supra*, 51 Cal.3d at p. 383, fn. 17.)

B. Parents In Juvenile Dependency Proceedings Have A Right To Appeal.

In dependency proceedings, a parent has the right to appeal from any order specified in section 395, which allows any judgement to be appealed "in the same manner as a final judgment." (§ 395; Cal. Rules of Court,[9] rule 5.585(b).) Generally, the notice of appeal must be filed within sixty days after the rendition of the judgment or the making of the order being appealed." (Rules 8.406(a), 5.590, 5.661(b).)

This sixty-day rule has been held to be jurisdictional. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-670.) "The consequences of an untimely appeal …. are not remediable. In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal." (*In re Z.S.* (2015) 235 Cal.App.4th 754, 768.)

Even though appellate jurisdiction is dependent upon the filing of a timely notice of appeal, exceptions have been made in certain situations, including for parents who are inmates or patients in custodial institutions. (Rule 8.25(b)(5) [if the clerk receives a document by mail from an inmate or patient in a custodial institution after the period for filing the document has expired but the envelope shows that the document was mailed or delivered to custodial officials for mailing within the period of time for filing the document, the document is deemed timely filed].) The "expansion of the constructive filing doctrine is now a

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[9] All further references are to the California Rules of Court, unless specified otherwise.

general provision of the court rules applicable to all types of cases, including dependency cases, involving inmates or patients in custodial institutions." (Seiser & Kumli, Cal. Juv. Cts. Prac. & Proc. (2019) § 2.190[4], 2-717.)

Some flexibility to the jurisdictional requirement of a notice of appeal has also been allowed to parents in other situations: clerical error, appeal of a section 362.4 order upon termination of jurisdiction, orders from referees, failure by trial court to advise parties of their appellate rights, and notices of appeal filed by any other party. (Rule 5.560(f) [clerical errors may be corrected by the court at any time]; see *In re Markaus V.* (1989) 211 Cal.App.3d 1331, 1337 [an appeal of a section 362.4 juvenile court custody order made upon termination of juvenile court jurisdiction must be filed within sixty days after issuance and filing of the written order if that occurs after the oral pronouncement]; Rule 8.406(a)(2), (3) [a notice of appeal from a judgment or subsequent order made by a referee not sitting as a temporary judge must be filed within sixty days of the date on which the order of the referee becomes final under rule 5.540(c), if no request for rehearing was filed or a rehearing granted]; Rule 5.725(h), 5.590(a), *In re A.O.* (2015) 242 Cal.App.4th 145, 147 [court is required to advise all parties of their appellate rights]; Rule 8.406(b) [if one party files a timely notice of appeal, the time for any other party to appeal from the same judgment or order of the juvenile court is extended until 20 days after the superior court clerk mails notification of the first appeal].)

In addition, a reviewing court may grant an extension of time for the filing of a notice of intent when "exceptional good cause" has been shown. (Rule 8.454(e).) Exceptional good cause has been found when the parent was not provided notice of the right to appeal or the right to file a notice intent to file a petition for writ relief. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 722-724.) In *In re Janee J.* (1999) 74 Cal.App.4th 198, Division Two of the First District Court of Appeal suggested that due process would require the court of appeal reviewing an order terminating parental rights to entertain a parent's tardy attack on earlier proceedings if the challenge related to "some defect that undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole." (*Id.* at p. 208.)

Any protections afforded to parents to date have been limited and do not remedy the problem a parent encounters when, due to the negligence of their counsel, the notice of appeal is not timely filed. The right to appeal is illusory if it can be so easily nullified by the actions of others.

C. Parents Have The Right To Effective Assistance Of Counsel In Juvenile Dependency Proceedings.

Whereas our systems of general criminal and civil law have roots going back centuries to English common law, juvenile dependency practice has been described as a "relatively recent legal development, both nationally and in California." (Cal Juv. Dep. Prac. (2019) § 1.1 at p. 2.) The substantial systematic involvement of the court in child protection cases did not

commence until approximately 60 years ago with the publication of an article[10] which "raised political, professional, and public awareness of child abuse throughout the nation." (*Ibid.*)

Most parents in juvenile dependency proceedings are "often poor, uneducated, or members of minority groups…" (*Santosky v. Kramer, supra*, 455 U.S. at p. 763) who are indigent and cannot afford an attorney. (Cal Juv. Dep. Prac.2019, § 11.4, p. 1061.) The dependency statutory scheme was drafted to ensure that indigent parents, guardians, and children have the right to appointed counsel when out-of-home placement of the child is at issue. (§ 316, 317, subds. (a), (b), (d); Rules 5.590(a)(3), 8.403(b)(2).) Legal representation begins at the detention hearing and continues at all subsequent proceedings before the juvenile court, including termination proceedings, and shall continue "unless relieved by the court upon the substitution of other counsel or for cause." (§ 317, subd. (d).)

Counsel is provided at no cost to indigent parents either through public defender offices, a panel of appointed counsel, or contracts with law firms. The representation of indigent parents has largely been modeled on systems for representation of criminal defendants. "This generally means that the inadequacies of the criminal defense system are transferred to the representation of parents in termination proceedings. Those inadequacies include underfunding, which translates to low pay for attorneys; caseloads larger than an attorney can

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[10] Kempe, Silverman, Steele, Droegmuller & Silver, *The Battered Child Syndrome*, 181 J of AMA 17 (1962)

conscientiously handle; few resources for investigation of cases and little support staff …" (Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J.App.Prac.&Process 179, 184 (2004); see also "*System on the Brink: How Crushing Caseloads in the California Dependency Courts Undermine the Right to Counsel, Violate the Law, and Put Children and Families at Risk*" American Civil Liberties Union of California (May 26, 2015) https://www.aclusocal.org/sites/default/ files/wp-content/uploads/2015/05/DependencyCourtsWhitePaper-CA.pdf)

California's dependency system has been described as "overstressed and under resourced, burdened by crowded dockets and inadequate information" with juvenile dependency court attorneys having an average caseload of 273 cases that exceeds the recommended standard of 188 cases adopted by the Judicial Council. (Blue Ribbon Commission, Fostering A New Future For California's Children, Final Report and Action Plan at p. 4 (2009).)

The statutory right to counsel for indigent parents was expanded in 1995 to include the right to competent counsel. (§ 317.5) In *In re Kristin H., supra*, 46 Cal.App.4th 1635, the Sixth District Court of Appeal analyzed the nature of this statutory right to counsel and concluded the right is of little value unless there is an expectation that counsel's assistance will be effective. (*Id*. at p. 1660; see also *Conservatorship of David L.* (2008) 164 Cal.App.4th 701, 710 [implicit in the statutory right to counsel is

a right to effective assistance of counsel protected by the Due Process Clause of the United States Constitution].)

Because parents have a right to effective assistance of counsel, they are entitled to a judicial review of claims of incompetence of counsel by petition for writ of habeas corpus. (*In re Kristin H., supra,* 46 Cal.App.4th at pp. 1643, 1663.) "The conclusion that the statutory right to competent counsel carries with it the right to judicial review is entirely consistent with the legislative history of the bill enacting section 317.5." (*Ibid.*, citing Sen. Bill No. 783, (1994 Reg. Sess.) Stats. 1994, ch. 1073, § 1.) By providing such a right, the statute 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. (Assem. Com. on Judiciary Rep., Apr. 13, 1994, Sen. Bill No. 783.)" (*In re Kristin H., supra,* 46 Cal.App.4th p. 1663.)

Most parents in juvenile dependency proceedings are not versed in the intricacies of the legal system. They rely on their appointed counsel to help them to navigate a system that wields the possibility of a devastating penalty – termination of parental rights. Unfortunately, appointed counsel generally is required to handle large caseloads with limited resources. The appellate process provides the parent an opportunity for review of the juvenile court's decisions to ascertain if any prejudicial errors were made by the court and, when necessary, review the effectiveness of their appointed counsel.

D. The Right To Effective Assistance Of Counsel Includes The Timely Filing Of A Notice Of Appeal When Requested.

Parents in dependency proceedings have the right to appeal any judgment "in the same manner as a final judgment." (§ 395; rule 5.585(b).) To appeal from a judgment or appealable order, a notice of appeal signed by either the appellant or the appellant's attorney must be filed in superior court within sixty days from the date of judgment. (Rule 8.405(a)(1), (a)(2).) Counsel's representation of the parent continues until the period for filing a notice of appeal has expired. (§ 317, subd. (d).)

Where a defendant clearly indicates a desire to appeal, the "trial attorney is under a duty not to ignore that request." (*People v. Diehl* (1964) 62 Cal.2d 114, 118.) This Court asserted that "[a]lthough the act of filing a notice of appeal is purely mechanical, its timely performance is vital. Help to an uninformed client in such circumstances is indispensable. If a defendant asks his attorney to appeal, and the latter agrees but fails to do so, even if his lawyer feels such an appeal would lack merit, the defendant is entitled to protection." (*People v. Tucker* (1964) 61 Cal.2d 828, 832.)

The United States Supreme Court also has concluded that effective assistance of counsel includes the timely filing of an appeal where appropriate. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477.) The Court stated,

> …a lawyer who disregards specific instructions for the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. [Citations.] This is so because a defendant who instructs counsel to initiate an appeal

> reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wish.

(*Ibid*.)

The Court noted the "even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any 'presumption of reliability,' [citation], to judicial proceedings that never took place." (*Roe v. Flores-Ortega, supra*, 528 U.S. 470, 483.) The failure of counsel to file a notice of appeal on request deprives the defendant of the appellate proceeding altogether.

If an indigent parent has a right to file a notice of appeal, a right to appointed counsel on appeal, and the right to an effective appeal, it naturally follows that a parent has a right to access that appeal. (See *In re Jacqueline H.* (1978) 21 Cal.3d 170, 173-177; *Appellate Defenders, Inc. v. Cheri S.* (1995) 35 Cal.App.4th 1819, 1821, 1826-1827.) When the conduct of trial counsel denies a parent access to the appellate process, that deficient and prejudicial performance is, by definition, ineffective assistance of counsel which the parent should be allowed to redress.

II. The Constructive Filing Doctrine Developed To Ensure Litigants Were Not Denied Access to Justice In The Court Of Appeal As A Result Of Circumstances Beyond Their Control.

The constructive filing doctrine does not excuse a late filed appeal, create an exception for a litigant to avoid the jurisdictional time restrictions for filing a notice of appeal, or extend the time to file a notice of appeal. It simply redefines the point at which the notice is deemed filed. (*Silverbrand v. County of Los Angeles*, *supra,* 46 Cal.4th at p. 127.) It is "nothing more than a basis for judicial acceptance of an excuse for the appellant's delay in order to do justice." (*In re Benoit* (1973) 10 Cal.3d 72, 84.)

Reason and justice have compelled the expansion of the doctrine in the years since its inception.

A. The Constructive Filing Doctrine Was Developed To Protect A Pro Per Incarcerated Defendant's Right To An Appeal.

The notion of constructive filing of a notice of appeal was developed as early as 1947. (*People v. Slobodian* (1947) 30 Cal.2d 362.) At the time *Slobodian* was decided, a criminal defendant had ten days to file a notice of appeal. (Former Rule 31(a)[11].) Slobodian, who was self-represented and incarcerated, deposited his notice of appeal in the mail box at San Quentin within the

[11] Former Rule 31(a) of the Rules of Appeal provided that an appeal (in a criminal case) may be taken by filing a written notice of appeal with the clerk of the superior court within 10 days after the rendition of the judgment.

required ten-day period to file a notice of appeal. However, the notice of appeal was not timely filed because it was not placed in the mail by prison employees until ten days after Slobodian had deposited his notice. (*People v. Slobodian, supra*, 30 Cal.2d at pp. 363-365.)

This Court found that, under the circumstances, "reason and justice compel[led]" that Slobodian not be denied his right to appeal. (*People v. Slobodian, supra*, 30 Cal.2d at p. 365.) This Court held that appellant's delivery of his notice of appeal to the prison employees six days prior to the expiration date for taking an appeal "constituted a constructive filing within the prescribed time limit and satisfied the jurisdictional requirement as contemplated by law." (*Id.* at p. 367.) This Court explained "that the state's failure, through its employees, to function in protection of appellant's exercise of his right of appeal, will not deprive him of such right after he has timely performed, as far as the state allows, all the steps required by the state law in perfection of his appeal." (*Id.* at p. 368.)

In a concurring opinion, Justice Carter emphasized "[t]his case presents the simple issue of whether a person loses his right to appeal when the notice of appeal is filed late due to no fault on his part." (*People v. Slobodian, supra*, 30 Cal.2d at p. 368 (conc. opn. of Carter, J.).) Justice Carter discussed the "absurd results (denial of the rights of appeal)" which flowed from the rulings in *Estate of Hanley* (1943) 23 Cal.2d 120 (a civil case) and *People v. Lewis* (1933) 219 Cal. 410 (a criminal case) where the Supreme Court had determined that there were "no circumstances

whatsoever which will save a person from losing his right of appeal in either a civil or criminal case where the notice is filed late." (*Id.* at p. 369 (conc. opn. of Carter, J.).) Justice Carter noted that those cases stood "practically alone in the United States" in announcing that doctrine. (*Id.* at p. 370 (conc. opn. of Carter, J.).) Justice Carter concluded, "[t]o my mind a much sounder theory on which to base the decision would be to hold that when the failure to file a notice of appeal is the result of fraud, mistake, inadvertence or neglect on the part of the adverse party and there is no negligence or lack of diligence on the part of the appellant, the time to file the notice of appeal is extended and the appellant loses no rights thereby." (*Id.* at p. 372 (conc. opn. of Carter, J.).)

B. The *Slobodian* Rule Was Extended To Include Circumstances Where The Conduct Of State Actors, Even If Negligence Could Not Be Shown, Denied A Pro Per Incarcerated Defendant The Right To A Timely Appeal.

The *Slobodian* rule was extended to situations where the conduct of prison officials was relied on by the defendant and was a substantial factor in bringing about the delay, even if the negligence of those officials could not be shown. The focus of these cases was that the defendant was "lulled into a sense of security" by the actions or statements of state officials that his or her notice of appeal would be timely filed. (See *People v. Head* (1956) 46 Cal.2d 886, 889 [defendant timely filed the notice of appeal as far as was possible for him to do so or was "lulled into a sense of security by prison officials"]; *In re Gonsalves* (1957) 48 Cal.2d 638, 646 [prisoner did all he could in compliance with jail rules to

institute an appeal but the notice vanished and did not reach the clerk of the court]; *People v. Calloway* (1954) 127 Cal.App.2d 504, 507 [defendant "lulled into a false sense of security" by the prison advisory counsel, a representative of the state]; *People v. Martin* (1963) 60 Cal.2d 615, 619, [self-represented defendant was "lulled into a false sense of security" by trial judge].)

In *People v. Dailey* (1959) 175 Cal.App.2d 101, 107, the *Slobodian* rule was extended to self-represented appellants who delivered a notice of appeal from a criminal conviction to prison officials anytime within the 10-day filing period, including on the last day. The Court sought to reduce the appellate courts' involvement when a notice of appeal arrived late at the county clerk's office to the "simple question of when it was handed" to the prison official. (*Ibid.*) This would give appellants the "same rights and the same justice." (*Id.* at p. 104.)

C. In *In re Benoit,* This Court Determined That Incarcerated Defendants Who Were Represented By Counsel Were Entitled To The Same Protections Afforded By The Constructive Filing Doctrine When Their Counsel Failed To Timely File Their Notice Of Appeal As Requested.

In *Benoit*, this Court discussed the "emergence and development" of the principle of constructive filing and explained that the doctrine generally had applied in situations where the incarcerated appellant "did all he could to take the appeal but was thwarted by the acts of prison official or that he was lulled into a sense of security by their conduct or representations." (*In*

re Benoit, supra, 10 Cal.3d at p. 86.) Those appellants were in pro per and did not have the assistance of counsel.

In re Benoit, supra, 10 Cal.3d 72, was decided after the 1972 amendment to former rule 31(a). The 1972 amendment extended the time for filing a notice a notice of appeal from ten days after judgment to sixty days and eliminated the provision of former rule 31(a) which empowered the appellate courts to grant relief from failure to file a timely notice of appeal. (*Id.* at p. 80.)

Despite the additional time provided to file a notice of appeal, this Court retained the protections afforded by the constructive filing doctrine. This Court "believe[d] that in the interest of justice the principle should also be extended to situations …where the defendant is incarcerated or otherwise in custody after having been properly notified of his appeal rights by the sentencing judge and *has made arrangements with his trial attorney to file a notice of appeal for him*." (*In re Benoit, supra*, 10 Cal.3d at p. 86, emphasis added.) When trial counsel fails to follow through on his or her part of the arrangement to timely file a notice of appeal, the constructive filing doctrine should apply because "such an appellant may be lulled into a false sense of security in believing that an attorney – especially his trial attorney – will carry out his undertaken task." (*Id.* at p. 87.)

This Court set forth the following factors relevant to the determination of whether the constructive filing doctrine should be applied: (a) the justifiable reliance of the defendant on his or her attorney to file a notice of appeal, (b) the due diligence of the defendant in assuring herself that a notice of appeal was being

timely filed, and (c) the ineffective assistance of counsel in failing to timely file such a notice. (*In re Benoit, supra*, 10 Cal.3d at pp. 86-89.)

Benoit's extension of the doctrine recognized that, if those three factors were met for an incarcerated defendant represented by counsel, relief from the untimely filed notice of appeal should be available.

D. In *Silverbrand*, This Court Extended The Doctrine To Encompass Civil Appeals To Ensure Equality Of Access To The Courts.

In *Silverbrand v. County of Los Angeles*, *supra*, 46 Cal.4th 106, this Court extended the constructive filing doctrine to a self-represented prisoner's filing of a notice of appeal in a civil case for medical malpractice. In discussing the evolution of the doctrine, this Court noted that the prison-delivery rule – a form of the constructive filing doctrine - was "intentionally drafted broadly to encompass both current and potential future exceptions." (*Id.* at p. 129.) Accordingly, this Court found no basis for distinguishing the appeal rights of self-represented prisoners from those of persons not in custody or from prisoners represented by counsel, simply because the appeal was civil in nature. (*Id*. at p. 122.)[12]

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[12] The *Silverbrand* Court noted that its decision was consistent with the federal rules of appellate procedure and the national trend. (See *Houston v. Lack* (1988) 487 U.S. 266 [prison-delivery rule applies to filings by federal prisoners in federal proceedings]; Fed. Rules App.Proc. rule 4(c)(1); see also *In re Flanagan* (3d Cir.1993) 999 F.2d 753, 757–759 [extending *Houston*'s rule to notice of appeal filed in district court from final bankruptcy court order].)

This Court clarified that the doctrine did not excuse a late-filed appeal or create an exception to avoid the jurisdictional requirements of filing a notice of appeal. Instead, "[t]he rule simply provides that the time of the filing constructively occurs, as a matter of law," when the notice of appeal is properly delivered. (*Silverbrand v. County of Los Angeles, supra*, 46 Cal.4th at p. 120.) Consequently, the policies of "speedy resolution and finality of judgment" are not subverted by the rule. (*Id*. at p. 121.)

Additionally, the *Silverbrand* Court noted that civil cases "frequently concern important constitutional issues, such as prison conditions, deprivation of civil rights, and the *termination of parental rights*, as well as other significant matters, such as marital dissolution." (*Silverbrand v. County of Los Angeles, supra*, 46 Cal.4th at p. 121, emphasis added.) Because substantial rights depend upon the filing date of a notice of appeal, this result was both "'necessary and right.'" (*Id.* at pp. 121-122, quoting *In re Jordan* (1992) 4 Cal.4th 116, 130.) Applying the doctrine to civil cases served to "create functionally equivalent time bars for all appellants and reaffirms the 'equality of access to our courts'" that has been found to be vital. (*Ibid.*)

This Court also disagreed with the argument that appellate courts were constrained by the rules of court from extending the rule to civil appeals. It was "clear…, nothing in the plain language of the rules prohibits application of the prison-delivery rule to civil appeals." (*Silverbrand v. County of Los Angeles, supra*, 46 Cal.4th at p. 125.) The rules of court did not

demonstrate an intent or purpose to codify a restriction on the constructive filing doctrine. Rather, "the Judicial Council has anticipated that courts would apply the prison-delivery rule to situations in which the rule has not been previously applied." (*Id.* at p. 128.)

Disproving the County's assertion that the rules of court address the doctrine "solely in the context of criminal appeals," the *Silverbrand* Court noted that the rules of court already "specifically apply the prison-delivery rule to juvenile appeals and notices of intent in juvenile dependency writ proceedings." (*Id.* at p. 125, fn. 17.)

E. **The Protections Of The Doctrine Have Also Been Extended To Non-Incarcerated Litigants**.

The constructive filing doctrine and its protections have not been limited to incarcerated defendants. The doctrine has been applied to provide the People the right to relief from a late filed notice of appeal. (*People v. Snyder* (1990) 218 Cal.App.3d 480, 492 overruled on other grounds by *People v. DeLouize* (2004) 32 Cal.4th 1223, 1233, fn. 4.) In applying the doctrine to an appeal by the People, the Court explained that "neither 'incarceration' nor 'fault of others' is an absolute prerequisite to its application." (*Ibid.*)

In *Snyder*, Division One of the Fourth District Court of Appeal found that the "People should not be unfairly deprived of their right to prosecute an appeal from the original order granting a new trial." (*People v. Snyder, supra,* 218 Cal.App.3d at p. 491.) In reaching its decision, the Court explained that the

constructive filing doctrine was an "ameliorative doctrine" that sprung "from the recognition that delayed filings should be permitted where 'slavish adherence to such deadlines…[would] violate more basic justice' [citations omitted], and where the cause of the delayed filing was not principally attributable to the fault of the appellants. [citations omitted]." (*Id.* at pp. 491-492.)

Despite its application and extension to civil cases, to defendants represented by counsel, and to non-incarcerated appellants, to date, the constructive filing doctrine - which has been described as being based on reason, justice, fairness, and access to justice - has not been afforded to parents in juvenile dependency proceedings who face the unique deprivation of termination of their parental rights. In fact, those protections have been expressly denied time and time again by the appellate courts.

III. Parents In Juvenile Dependency Proceedings Should Be Entitled To The Protections Provided By The *Benoit* Form Of The Constructive Filing Doctrine.

A. Historically, The Constructive Filing Doctrine Has Not Been Applied To Juvenile Dependency Proceedings Involving The Termination of Parental Rights.

Despite the fundamental liberty interests at stake, the protections of the constructive filing doctrine have not been extended to parents facing the irretrievable destruction of the parent-child relationship.

Several appellate decisions that have ruled against the extension of the constructive filing doctrine in juvenile

dependency proceedings involved a statutory scheme that has since been replaced. Prior to 1989, juvenile dependency proceedings under section 300 were entirely separate and distinct from actions which terminated parental rights under former Civil Code section 232. These cases involving the prior statutory scheme declined to extend the doctrine citing the "special need for finality in cases under section 232" and expressed concern that adoptive proceedings "could be jeopardized if the finality of a judgment under section 232 was uncertain." (*In re A.M.* (1989) 216 Cal.App.3d 319, 322, *In re Isaac J.* (1992) 4 Cal.App.4th 525, 534-535, *In re Alyssa H.* (1994) 22 Cal.App.4th 1249,1254.)

Nevertheless, the appellate courts recognized that the constructive filing doctrine could be appropriate in juvenile dependency proceedings under certain situations. In *In re Isaac J., supra*, 4 Cal.App.4th 525, Division Two of the Fourth District Court of Appeal stated that the attorney's inaction could "be justly characterized as ineffective assistance of counsel." (*Id.* at p. 532.) The *Isaac J.* Court stated that it "may very plausibly" be argued that a parent must be given a right to pursue his or her appellate rights despite the attorney's inexcusable failure to prefect the appeal in a timely fashion. (*Id.* at p. 532.) However, "reasons of policy" dictated that at the termination of parental rights, "this is the point at which the interests of the child and parent collides, and at which the child's interest in finality prevails." (*Ibid.*) The Court declined to follow *In re Benoit* and held that the remedy of habeas corpus could not be employed as a means of obtaining belated relief in [former] Civil Code section

232 proceedings. *Isaac J.* recognized that the "result will be harsh in some cases" but it could not formulate rules for the applicability of a standard "under which we could confidently predict that more good would be done than harm." (*Id.* at p. 534.)

Justice Timlin wrote a persuasive dissent disagreeing with the majority's conclusion. (*In re Isaac J., supra*, 4 Cal.App.4th at pp. 536-543 (dis. opn. of Timlin, J.).) The dissent agreed with the Court's position that a minor's interest in a final, stable, long-term relationship was an important one but did not agree that the law, "in seeking to protect a minor's interest in such relationships, should countenance an irrevocable and complete severance of a parent-child relationship on the basis of anything less than a full and fair adjudication of the grounds alleged in support of such a severance." (*Id.* at p. 538 (dis. opn. of Timlin, J.).) Citing to *Santosky v. Kramer, supra*, 455 U.S. 745, the dissent emphasized the importance of providing parents with fundamentally fair procedures and "the fact that important liberty interests of the child … may be affected by a permanent neglect proceeding does not justify denying the natural parents constitutionally adequate procedures." (*Id.* at p. 539 (dis. opn. of Timlin, J.).) Consequently, the opportunity for a parent to be heard includes a fair opportunity to be heard "*on appeal*." (*Ibid.*, original italics.)

The dissent argued that employing the specific factors set forth in *Benoit* that established ineffective assistance of counsel in failing to file the notice of appeal in a timely fashion had "several salutary effects." (*In re Isaac J., supra*, 4 Cal.App.4th at

p. 541 (dis. opn. of Timlin, J.).) For example, a proper showing of "justifiable reliance" would include "a showing of an affirmative act by the appellant to obtain counsel's services in pursuing an appeal as well as some showing of an affirmative response by counsel that he or she would pursue an appeal." (*Id.* at pp. 540-541(dis. opn. of Timlin, J.).) Requiring a showing of due diligence on the part of the appellant would "deny the privilege of a late filing to those who merely told their counsel to file an appeal and then 'forgot about it.'" (*Id.* at p. 541(dis. opn. of Timlin, J.).) Finally, requiring an appellate court to base its determination on the *Benoit* factors focused the court's attention on "the precise issue at hand – whether a late filing should be allowed so as to protect the fundamental constitutional interests of the appealing party – without calling for a preliminary examination into the equities or competing policy considerations raised by the overall circumstances surrounding …. the case subject to appellate review." (*Ibid.*)

Justice Timlin concluded,

> To adopt a blanket, "across the board" holding, as the majority does, that the *Benoit* constructive filing doctrine simply does not, ever, apply to late filed appeals in termination of parental rights cases where the late filing of the appeal is attributable to the professional incompetence of an appellant parent's counsel would (1) severely (and, to a large degree, needlessly) undermine that appellant parent's constitutionally protected 'fundamental liberty interest' in the basic human rights to conceive and raise children and (2) deprive that appellant parent his or her constitutional right to receive the full appropriate measure of the due process of law in contesting the termination of his or her parental rights.

(*Id*. at pp. 542-543 (dis. opn. of Timlin, J.).)

The reviewing courts that addressed the application of the constructive filing doctrine post-*Isaac J.* were either not faced with a request to apply the constructive filing doctrine or not required to grapple with a true *Benoit*-like situation. For example, *In re Alyssa H.*, *supra*, 22 Cal.App.4th 1249 involved an appeal from a termination proceeding under former Civil Code section 232 which was filed past the sixty-day deadline. (*Id.* at p. 1252.) After filing the opening brief, respondent moved, without opposition, to dismiss the appeal on the grounds that the notice of appeal was untimely filed. (*Ibid*.) In its reply brief, appellant did not address the timeliness issue or raise the constructive filing doctrine. (*Ibid*.) Division Five of the First District Court of Appeal found the notice to be untimely, and dismissed the appeal. (*Id.* at p. 1254.)

In *In re Ricky H.* (1992) 10 Cal.App.4th 552, Division Two of the Fourth District Court of Appeal found mother would not qualify for relief under the constructive filing doctrine because her failure to file a timely appeal from the section 366.26 orders was the "result of her own deliberate decision not to pursue an appeal, not from a reasonable but disappointed reliance upon promise of counsel to do so. The constructive filing doctrine is not intended to save an appellant from the natural consequences of his or her own decisions." (*Id.* at p. 560.)

In *In re Ryan R.* (2004) 122 Cal.App.4th 595, mother informed her trial counsel of her desire to appeal the order terminating her parental rights on the afternoon of the last day

to file a notice 's notice of appeal. By the time counsel received the message, the clerk office was closed. Counsel filed the notice of appeal the next day. (*Id.* at p. 597.) The Court issued an order to show cause why the appeal should not be dismissed as untimely. In response, mother argued the court failed to properly notify her of her right to appeal and that the 60-day filing deadline never began to run because the court did not file its order terminating her parental rights on Judicial Council Form JV-320. She did not invoke the constructive filing doctrine. (*Id.* at pp. 598-599.) Division Four of the First District Court of Appeal rejected mother's arguments and dismissed the appeal as untimely. In reaching its decision, it also referenced the child's "special need for finality in adoption related proceedings." (*Id.* at p. 598.)

Division One of the Second District Court of Appeal found the "mere fact" of a parent's incarceration did not suffice to excuse a parent from timely filing. (*In re Z.S.*, *supra*, 235 Cal.App.4th at p. 769.) In *Z.S.,* father's notice of appeal was filed over six months after the order terminating his parental rights and almost one month after the adoption was finalized. (*Id.* at p. 767.) Father argued the constructive filing doctrine should apply. The Court disagreed, stating the constructive filing doctrine did not apply in termination of parental rights proceedings and there was no showing that the late notice of appeal was the result of negligence by a prison official. (*Id.* at p. 769.)

Most recently, in *In re J.A.* (2019) 43 Cal.App.5th 49,[13] at a jurisdiction and disposition hearing, the juvenile court placed the children with their nonoffending, noncustodial father and dismissed dependency with family law exit orders. Sixteen months after that hearing, mother attempted to challenge the court's findings and unwind the removal order. (*Id.* at p. 54.) Mother argued that the lateness of her notice of appeal should be excused because the juvenile court failed to advise her of her appellate rights at the jurisdictional and dispositional hearing as required under rule 5.590(a). (*Id.* at p. 51.)

Respondent countered that the appeal was untimely and the juvenile court's failure to advise mother of her appellate rights sixteen months earlier did not excuse the "extreme delay" in the case. (*In re J.A., supra*, 43 Cal.App.5th at p. 54.) Division Two of the Fourth District Court of Appeal stated it lacked jurisdiction to consider mother's belated challenge. (*Ibid.*) The Court noted there was "simply no authority for the proposition that a parent may reopen a long closed dependency to relitigate issues of jurisdiction and disposition based on a violation of rule 5.590." (*Id.* at p. 56.) Without addressing the constructive filing doctrine, the Court stated the purpose of appeal deadlines was to promote the finality of judicial decisions and provide security to the litigating parties. "Nowhere is this purpose more crucial than in dependency cases, where the paramount consideration is child welfare." (*Ibid.*)

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[13] A petition for review was filed January 15, 2020, and denied on March 11, 2020. (Supreme Court Case number S260160.)

California's "strong public policy in favor of hearing appeals on their merits and of not depriving a party of his right to appeal because of technical noncompliance where he is attempting to perfect his appeal in good faith" weighs in favor of the application of the doctrine to dependency proceedings. (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 853-854.) However, to date, application of the constructive filing doctrine in juvenile dependency proceedings has been hindered by two issues. First, discussion of the doctrine by the Courts in an outdated statutory scheme that separated dependency proceedings from termination proceedings. Second, a belief that a child's need for finality could not be reconciled with the constructive filing of a parent's timely expressed wish to file a notice of appeal.

It is important to note that for three decades, the former Civil Code section 232 proceedings have not been used to terminate parental rights. In 1989, "sweeping revisions" were made to the statutory scheme. (*In re Kristin H., supra*, 46 Cal.App.4th at p. 1660-1661.) Since that time, dependency proceedings have been governed by one statutory scheme that combined section 300 petitions and permanency planning hearings into an "overall process" that defined a "whole system of law." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307.) Accordingly, appellate decisions discussing the application of the constructive filing doctrine to former Civil Code 232 proceedings are not dispositive to the current statutory scheme. "It is axiomatic that cases are not authority for propositions not considered." (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

With respect to the child's need for finality, this Court has recognized that the constructive filing doctrine does not "subvert the policies of speedy resolution and finality of judgment that underlie the jurisdictional requirement of a timely appeal." (*Silverbrand v. County of Los Angeles, supra*, 46 Cal.4th at p. 121.) The fundamental liberty interests at stake in dependency proceedings must be met with care and precision, not just speed. Furthermore, "if counsel's ineffective representation of the parent has resulted in an inappropriate termination of the parent-child relationship, the child may have an interest equal to that of the parent's in its restoration." (*In re Isaac J., supra*, 4 Cal.App.4th at pp. 531-532.)

The case before this Court exposes the denial of access to justice and resultant unfairness that occurs when ineffective representation by trial counsel severely undermines a parent's constitutionally protected "fundamental liberty interest" to conceive and raise children. The restrictions on the constructive filing doctrine that have been imposed in the dependency context deprive the parent of the constitutional right to receive the full appropriate measure of the due process of law in contesting the termination of their parent-child relationship. Application of the constructive filing doctrine is necessary to ensure that justice, fairness, and equal access to the courts are available to indigent parents who are often poor, uneducated, or members of a minority group.

B. **The Protections Of The Constructive Filing Doctrine Should Be Extended To Parents Facing Termination Of Their Parental Rights**.

As this Court has noted many times, the purpose of the doctrine is not to create jurisdiction where none exists, but to recognize its existence if justice 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.) Thus, in appropriate cases, the purpose of the jurisdictional requirements for bringing a timely appeal from a judgment is readily reconciled with the purposes of the constructive filing doctrine which favor the hearing of an appeal on the merits.

Some relief from the strict jurisdictional requirements of filing the notice of appeal has been provided to parents in juvenile dependency proceedings. (See, Argument I.B., *infra*.) In addition, the prison delivery rule has been extended to documents, including notices of appeal, mailed by parents who are inmates or patients from custodial institutions. (Rules 8.25(b)(5), 8.406(c), and 8.450(e).) However, judicial acceptance of the delay associated with counsel's negligence in failing to timely filing of a notice of appeal has not been afforded to parents to seeking to appeal from the termination of their parental rights.

In a civil matter, this Court has recognized "the exercise of judicial discretion in furtherance of facilitating equal access to justice" so that "indigent litigants are not, as a practical matter, denied their day in court." (*Jameson v. Desta* (2018) 5 Cal.5th 594, 605.) This Court noted,

> the policy of affording indigent litigants meaningful access to the judicial process establishes restrictions not only upon potential barriers created by *legislatively* imposed fees or procedures, but also upon *court*-devised policies or practices that have the effect of denying to qualified indigent litigants the equal access to justice that the in forma pauperis doctrine was designed to provide.

(*Id.* at p. 606.) Similarly, denying the constructive filing doctrine to dependency parents effectively creates a court-devised policy or practice that interferes with access to the courts. This Court should exercise its discretion to extend the constructive filing doctrine to parents in juvenile dependency proceedings.

Juvenile dependency proceedings involve fundamental rights that are protected by due process guarantees. (*In re Brendan P.* (1986) 184 Cal.App.3d 910, 915; *In re Malinda S., supra,* 51 Cal.3d at p. 383, fn. 17.) Accordingly, the irrevocable and complete severance of a parent-child relationship should be made on nothing less than a full and fair adjudication, which includes the related right to appeal, of the grounds alleged in support of such a "unique kind of deprivation." (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1707 [dependency proceedings "work a unique kind of deprivation"].)

Courts have focused on a minor's interest in the finality of termination proceedings to support their conclusion that the constructive filing doctrine should not apply to dependency proceedings. (*In re A.M., supra*, 216 Cal.App.3d at p. 322.) Elevating finality over accuracy of the trial court's decision to terminate parental rights does not advance any party's interest –

not the parent's, not the state's, and certainly, not the minor's. Extending the constructive filing doctrine to juvenile dependency proceedings, including the termination of parental rights, will "not subvert the policies of speedy resolution and finality of judgment that underlie the jurisdictional requirement of a timely appeal." (*Silverbrand v. County of Los Angeles, supra*, 46 Cal.4th at p. 121.) Instead, it "ensures that the [jurisdictional] requirement has the same practical effect in all cases." (*Ibid.*)

All parties share a significant interest in the accuracy of decisions made at a section 366.26 hearing. It is well settled that the stakes at termination of parental rights proceedings pursuant to section 366.26 are high for the parent who faces the permanent destruction of their relationship with their child. Parents have a "fundamental liberty interest" in retaining and maintaining a parent-child relationship. (*In re Laura F.* (1983) 33 Cal.3d 826, 844.) Parents have a liberty interest in the accuracy and justice of the resolution of his or her appeal. (*Lassiter v. Department of Social Services, supra*, 452 U.S. at p. 27.)

However, children also have "an interest equal to that of the parent" in the restoration of an inappropriate termination of the parent-child relationship. (*In re Kristin H., supra*, 46 Cal.App.4th at p. 1664.) The "stakes for the minor at the section 366.26 hearing" are high due to the severity of the consequences of an erroneous decision. (*In re B.D.* (2019) 35 Cal.App.5th 803, 826.) The child has a derivative liberty interest in an accurate and just resolution of his parent's appeal. (*In re Sade C.* (1996) 13 Cal.4th 952, 988.)

The state also has an interest in the legitimacy of the dependency system and ensuring that a child's welfare is protected by a correct decision. The state has a "parens patriae interest in preserving and promoting the welfare of the child…" (*Santosky v. Kramer, supra*, 455 U.S. at p. 766.) A vital government interest exists in producing an accurate and just resolution of dependency proceedings. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1247 citing to *In re Sade C., supra,* 13 Cal.4th 952, 989.) Dependency proceedings must be concluded rapidly but fairly. (*Lassiter v. Department of Social Services, supra*, 452 U.S. at p. 32.)

The interests of a parent, their child, and the state in an accurate decision terminating a parent's fundamental liberty interest in their child overlap significantly. It has been noted that "unless we are concerned about justice for the parent, it is unlikely that justice will be achieved for the child." (Alfred Kadushin, *Beyond the Best Interests of the Child: An Essay Review*, 48 Soc. Serv. Rev. 508, 514 (1974).)

Parties in dependency proceedings have a right to competent court-appointed counsel throughout the proceedings. (§§ 317, subd. (b), (d), 317.5.) Preventing the parent from asserting a claim of ineffective assistance of counsel does not further the interests of the child. (See *In re Kristin H., supra*, 46 Cal.App.4th at p. 1667.) The child's best interests include ensuring the integrity of the decision terminating their relationship with their biological family. A biological parent will always be relevant and important to the child. "[B]iological

parents, even when inadequate, continue to be significant in a child's development. The biological family is the source of identity for a child." (Margaret Beyer & Wallace J. Mlyneic, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 Fam. L.Q. 233, 237 (1986).) The Court in *In re Emilye A., supra*, 9 Cal.App.4th at p. 1707, fn. 7, posed an important question: "Can it be said that it is in the best interest of a child to be taken from the accustomed custody and control of his or her parents when there has not been a fair hearing related to the need for such intervention?"

Our legal system envisions, and allows for, appellate review of a trial court's decision when requested. An adoption cannot be finalized until after the appellate rights of the natural parents have been exhausted. (§ 366.26, subd. (j).) As a result, a child's permanency and the finality of the decision is naturally delayed by the appellate process itself.[14] Even with the deadlines applicable to section 366.26 fast-track appeals, the typical appellate process may take a year or more to resolve.[15] These

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[14] Parents have sixty days to file a notice of appeal. (Rule 8.406(a).) The record must be prepared and counsel will be appointed to represent the parent on appeal. (Rule 8.405 (b)(1)(B).) The briefing schedule is mandated by the rules. (Rule 8.412 (b).) Even though extensions of time are discouraged they are often permitted on a showing of exceptional circumstances. (Rule 8.416(f).) In fast-track cases, the Court of Appeal has 250 days to issue its opinion. (Rule 8.416 (e).) The parties then have time to file a petition for rehearing and/or petition for review. (Rules 8.268, 8.500.)

[15] The 2017 Court Statistics Report: Time from Notice of Appeal to Filing a Court of Appeal Opinion (90th percentile and median) Figure 33 Fiscal Year 2015-2016 statewide is 842 days.

delays inherent to dependency proceedings are permitted to ensure a parent receives due process.[16]

Given the overlapping interests of the parent, child, and state, ensuring that the parent has access to their right to timely appeal the order terminating parental rights protects the process as a whole and injects increased confidence in dependency proceedings and the outcome for a family. Applying the constructive filing doctrine in this instance is necessary for many reasons: to ensure equal access to justice, to protect a parent's fundamental liberty interests in the care, custody, and control of their child, to preserve the child's interest in an accurate determination terminating parental rights, and to safeguard the state's interest in the legitimacy of the dependency system.

(https://www.courts/ca/gov/documents/2017-Court-Statistics-Report.pdf.)

[16] These delays are also adverse to the parents' interests after the juvenile court has terminated parental rights. Once the termination order is entered, the parents generally are not permitted to have contact with their child which will most likely be detrimental to their relationship with the child. (§ 366.26, subd. (j) [once parental rights are terminated, the Department of Social Service is entitled to the "exclusive care and control of the child at all times.")

C. In This Case, The Constructive Filing Doctrine Should Be Extended To Mother As She Diligently Requested That Her Counsel File A Notice Of Appeal, Mother Justifiably Relied On Counsel's Promise To File The Notice Of Appeal, And It Was The Ineffective Assistance Of Counsel That Resulted In An Untimely Filed Notice Of Appeal.

Mother, a prior dependent child herself, was seventeen years old when the section 300 petition was filed on behalf of her daughter. (Aug CT 6, 12.) Mother was provided with appointed counsel at the detention hearing. (Aug CT 27.)

After her reunification services were terminated, mother continued to visit her daughter and work on her case plan. On April 8, 2019, she filed a section 388 petition for modification requesting return of her child or reinstatement of services. (2CT 369-370.) The section 366.26 hearing, which ultimately included the section 388 petition, was continued on several dates between February and April 2019. (1CT 279, 2CT 345, 385, 391, 395.) Mother attended all of those hearings, except for one when she was at school but available by phone. (2/6/19 RT1; 3/19/19 RT 1; 3/20/19 RT 1; 4/8/19 RT 1; 4/17/19 RT 1; 4/29/20 RT 1.)

Mother did not attend the June 12, 2019 contested hearing due to an asthma attack which required medical care. (Mother's Declaration.) The court denied her petition for modification and terminated her parental rights. (2CT 428-430.) In the days following the combined section 388 and section 366.26 hearing, mother contacted her counsel's office to inquire as to the status of her case. (Mother's Declaration.) She was told her parental rights

had been terminated and she had the right to appeal that decision. She contacted her attorney and informed her of her wish to file a notice of appeal. (Mother's Declaration.)

Less than a week after the hearing terminating mother's parental rights, her court-appointed attorney was aware that mother wanted to file a notice of appeal and agreed to file the notice of appeal. (Counsel's Declaration.) Unfortunately, two days past the statutory deadline, mother's counsel realized she forgot to file the notice of appeal within the sixty-day time limit. She filed the notice of appeal the next day. (Counsel's Declaration.)

It is clear from the facts that mother did what she was required to do. She diligently contacted her appointed attorney well within the sixty-day time limit and informed counsel of her wish to appeal the termination of her parental rights. It was reasonable for mother, especially considering her age, to rely on her counsel to file her notice of appeal. Unfortunately, her notice of appeal was not timely filed due to the action, or inaction, of her appointed counsel.

In a criminal case, appellate courts would routinely apply the constructive filing doctrine to redefine the point at which the notice was deemed filed and the appeal would proceed. However, even though the *Benoit* factors were clearly met in this case, mother's appeal was dismissed as untimely. Despite the irretrievable destruction of her fundamental liberty interest to parent her child, the door to equal justice was bolted shut to mother and the outcome of the state's proceedings remain unchecked.

This case presents compelling reasons for the application of the constructive filing doctrine to ensure equality of access to justice for parents who are often poor, uneducated, and members of a minority group.

IV. 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.

If this Court determines that a parent in a juvenile dependency case has the right to challenge his or her counsel's failure to file a timely notice of appeal from an order terminating parental rights, the question then becomes what is the proper procedure for a parent to raise such a claim. Mother contends that a noticed motion is the most appropriate procedure to use to ensure that a parent's right to appeal is protected while, at the same time, safeguarding the need for expeditious resolution of juvenile dependency matters.

The Rules of Court already provide the framework for the superior court clerk who receives a late filed notice of appeal. Specifically, rule 8.406(c) requires the clerk to 1) mark the late notice of appeal "Received [date] but not filed," 2) notify the party that the notice was not filed because it was late, and 3) send a copy of the marked notice of appeal to the district appellate project. (Rule 8.406(c).) The appellate project, which provides representation to indigent appellants in criminal, delinquency, mental health, and dependency appeals, receives the untimely filed notice of appeal and then conducts an investigation to determine the appropriate course of action. Generally, in

criminal, delinquency, and mental health cases, that may result in the filing of a "*Benoit*-based" motion seeking to have the untimely filed notice of appeal constructively filed. To date, that option has not existed for indigent dependency appeals.

An appellate court has the inherent authority to determine its jurisdiction. (*People v. Zarazua* (2009) 179 Cal.App.4th 1054, 1062.) Thus, it is the appellate court that rules on the applicability of the constructive filing doctrine to the circumstances of a particular case. (*Silverbrand v. County of Los Angeles, supra*, 46 Cal.App.4th at p. 110.)

Two main procedures have been used to inform the appellate court of the possibility of the constructive filing doctrine: a petition for writ of habeas corpus or a noticed motion.

In *In re Gonsalves* (1957) 48 Cal.2d 638, 639, this Court held a petition for writ of habeas corpus was *an* appropriate vehicle for determining whether a notice of appeal should be deemed timely. However, a petition for writ of habeas corpus has not been found to be the sole vehicle available for presenting an ineffective assistance of counsel claim. The Third District Court of Appeal in *People v. Zarazua, supra,* 179 Cal.App.4th 1054 noted that even though a party could seek constructive filing of a notice of appeal by filing a habeas corpus petition, there were not "legitimate reasons" to limit a defendant to that option alone. (*Id.* at p. 1062.) In reaching its decision, the Court stated that "for over 30 years" it and other appellate courts have used a motion procedure to resolve a defendant's request for constructive filing under *Benoit*. (*Ibid.*) The Court endorsed a noticed motion as an

appropriate procedure for a defendant to raise the issue of constructive filing of the notice of appeal.[17] (*Id.* at p. 1063.) The Court emphasized that "*Silverbrand* reached the question whether the notice of appeal was constructively filed, despite the fact that it was not raised in a habeas corpus petition or other extraordinary writ petition to invoke the appellate court's jurisdiction." (*Id*. at p. 1062.)

Habeas corpus procedures are ordinarily preferred, in the interests of judicial economy, "if the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged [,]…unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Mendoza-Tello* (1997) 15 Cal.4th 264, 266.) However, the situation presented by the constructive filing doctrine typically does not require an analysis of the reasoning behind a tactical trial decision. Rather, it is simply a determination of whether trial counsel failed to timely file a notice of appeal as requested by his or her client. The filing of a notice of appeal has been described as a purely ministerial task. (*Roe v. Flores-Ortega, supra*, 528 U.S. at p. 477) Tactical reasons are irrelevant, as a trial attorney has no discretion not to file a time notice of appeal upon the client's request. (*Ibid*.)

A noticed motion is often used to address claims of ineffective assistance of counsel. For example, appellate courts have entertained successful ineffective assistance of counsel

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[17] The appellate court must allow the opposition fifteen days to file an opposition to a motion before making its ruling. (*Id.* at p. 1064.)

claims in motions to recall the remittitur where an appellate attorney's deficient performance deprived an appellant of a potentially meritorious appeal. (See, e.g. *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 394; accord *People v. Phung* (2018) 25 Cal.App.5th 741, 747.) This Court has on at least one occasion elected to construe a petition for a writ of habeas corpus raising an ineffective assistance of counsel as an application to recall the remittitur. (*In re Smith* (1970) 3 Cal.3d 192, 203-204.) In addition, it has been determined that ineffective assistance of counsel can be the basis of a new trial motion in a criminal case in lieu of saving the issue for direct appeal or a petition for writ of habeas corpus. (*People v. Fosselman* (1983) 33 Cal.3d 572.) In *Fosselman*, this Court found that "in appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it should do so." (*Id.* at p. 582-583.) In none of the above-cited authorities did the reviewing court refuse to grant the requested relief – premised on claims of ineffective assistance of counsel – because the claims were advanced by way of motion rather than by habeas petition.

In the context of the constructive filing doctrine, claims of ineffective assistance of counsel can be resolved most efficiently by noticed motion. When a declaration from the appellant and/or trial counsel can establish the grounds for relief under the constructive filing doctrine, judicial economy is best served by

allowing a parent to seek relief by simple motion rather than the more cumbersome and lengthy procedures attending a formal petition for relief in habeas corpus. (See *People. v. Zarazua, supra,* 179 Cal.App.4th at pp. 1060-1063.) The Court of Appeal will be able to quickly determine whether it has jurisdiction without the prolonged procedures associated with a petition for habeas corpus. (See rules 8.380-8.388.)

In *Benoit*, this Court established a procedure that reconciled the jurisdictional requirement with the interests of reason and justice. A child's need for finality will not be subject to an extreme delay if the constructive filing doctrine is extended to juvenile dependency proceedings. Under *Benoit,* an appellant parent cannot sleep on their rights. Instead, the first showing they must make is their diligence in communicating their wish to appeal *within* the sixty-day time limit. Applying the constructive filing doctrine will not extend the time to file a notice of appeal. Rather, it ensures equality of access to our courts.

The concerns that have led appellate courts to deny application of the *Benoit* three-pronged formulation of the constructive filing doctrine in dependency proceedings have been rooted in the child's special need for finality. If this Court authorizes the invocation of the constructive filing doctrine, a noticed motion would better serve that interest than requiring a habeas petition.

CONCLUSION

It is well settled that parents in juvenile dependency proceedings are entitled to due process and the effective assistance of counsel. Despite the promise of these protections and the fundamental interests at stake, parents in juvenile dependency proceedings are repeatedly denied their right to appeal due to the ineffective assistance of their trial counsel in failing to timely file a notice of appeal as requested.

Parents in juvenile dependency proceedings deserve the same basic protection of the right to appeal that has been afforded to criminal defendants and even to the state. Parents should no longer be required to settle for anything less than what this Court has found fairness and justice command for other litigants.

Applying the constructive filing doctrine as contemplated by this Court in *Benoit* to parents in juvenile dependency proceedings facing the termination of parental rights will alleviate the harshness of the jurisdictional rule. Because parental termination decrees are irreversible, involve fundamental constitutional interests, and are described as being among the most severe forms of state action, the state must not bolt the door to equal justice for these parents.

The question presented here is a simple one: should a parent lose his or her right to appellate review when the notice of appeal is filed late due solely to the fault of their trial attorney, an officer of the court? The answer must be no.

Dated: July 20, 2020

Respectfully submitted,

/s/ Louise E. Collari
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CERTIFICATE OF WORD COUNT

Counsel for M.B. hereby certifies that this brief consists of **13,824** words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program.

Dated: July 20, 2020

/s/ Louise E. Collari
LOUISE E. COLLARI

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Re: *In re A.R.* **Case No.: S260928**

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Alameda County Counsel
1221 Oak Street, Suite 450
Oakland, CA 94612
(Respondent)

Alameda County Superior Court
Juvenile Justice Center
2500 Fairmont Drive
San Leandro, CA 94578

M.B.
(Appellant Mother)

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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. Executed on July 20, 2020, at Oakland, California.

/s/ BL Palmer

BL Palmer

STATE OF CALIFORNIA
Supreme Court of California

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Collari, Louise (156244)
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