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After an Unpublished Order by the Court of Appeal for the First Appellate District, Division One, Filed January 21, 2020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

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I. INTRODUCTION

There is no dispute that parents in juvenile dependency proceedings have a right to competent and effective assistance of counsel. The question this Court asks is whether 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 under Welfare and Institutions Code section 366.26? In answering that question, the Court must keep the primary public policy goals of the dependency scheme in mind. Certainly, the right of effective assistance of counsel, especially concerning the filing of a notice of appeal after an order terminating parental rights, is important. However, both sound public policy and precedent require that in a proceeding involving terminating parental rights and freeing a minor for adoption, the child's interests in stability and permanency should be given great weight. Due to the gravity of such an interest, this Court must affirm what previous appellate courts have held – that a parent can only pursue an appeal of the termination of parental rights when a timely notice of appeal has been filed.

This Court should not consider reversing this centuries-old precedent lightly. Under the facts of the underlying dependency case, this four year old child has been in a stable placement for most of her young life; she was removed from her mother's care when she was 10-months old, returned briefly when she was 14-months old, and then placed back with her former foster parent just over three months later. Thus, A.R. was in the care of her prospective adoptive parent from June 2017 to September 2017 and has been continuously in her care since January 2018. The minor's current placement is likely the only home that she knows, and to allow the mother the opportunity to have her untimely appeal heard over a year after the court terminated her parental rights could possibly destabilize permanency

and stability for this young dependent minor. In the interest of maintaining the finality of an order of a termination of parental rights after the time for appeal has lapsed, this Court must affirm that an appellate court has no jurisdiction to consider an appeal if a parent's notice of appeal is untimely.

If, in the alternative, the Court seeks 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 that the parent file a petition for writ of habeas corpus establishing both ineffective assistance of counsel, by not filing a timely notice of appeal, and that counsel's failure was prejudicial. Accordingly, the parent must show that they would have a likelihood of success on the merits if the court were to allow an untimely appeal to go forward. This requirement protects the parent's interest in accuracy of the trial court's decision and is warranted in juvenile dependency proceedings where a belated appeal subverts strong public policy and potentially destabilizes a dependent minor who is adoptable and in a permanent placement.

II. BACKGROUND

A. The Juvenile Court Detains A.R. From Mother in June 2017

On May 8, 2017, it was reported to the Agency that M.B. ("Mother") had made inappropriate childcare arrangements with people she barely knew. It was reported that Mother had suicidal ideation and had engaged in self-harm. (1 OCT 12.) Mother was known to the Agency because she was a minor and a former dependent. (1 OCT 12.) The maternal grandmother, Annie B., was appointed Mother's legal guardian and Mother's dependency was dismissed in December 2011. (1 OCT 12.) The Agency conducted an initial investigation and a child welfare worker went to Mother's home and

observed the then nine-month-old minor in the home and interviewed Mother, who stated that she had some symptoms of postpartum depression. (1 OCT 15.) Mother also reported that she cut herself and had over 20 cuts on both arms. (1 OCT 15.) Mother was receiving weekly therapy in the home. (1 OCT 16.) Mother's therapist reported that Mother functioned at an eight-year-old level and did not understand the concept of motherhood. (1 OCT 16.)

On June 14, 2017, Mother's legal guardian informed the child welfare worker that Mother had attempted suicide the previous night. (1 OCT 17.) Mother's legal guardian stated that Mother was in her bedroom and took lots of pills while the legal guardian was caring for the minor. (1 OCT 17.) The child welfare worker confirmed that Mother was hospitalized, and it was unknown when she would be discharged. (1 OCT 17.) On June 17, 2017, the minor, A.R. was delivered into protective custody and placed in a foster family home. (1 OCT 10.) On June 20, 2017, the Agency held a Team Decision Making meeting during which Mother admitted that she attempted suicide by taking pills. Mother stated that the suicide attempt was prompted by postpartum depression, recently going through a breakup, and family issues. (1 OCT 13.)

The Agency filed a Welfare and Institutions Code[1] section 300 petition on June 20, 2017, alleging that Mother had mental health concerns that negatively impacted her ability to provide regular care, supervision,

[1] 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.

and protection for the minor. (1 OCT 6.) On June 21, 2017, the minor was detained. (1 OCT 27-29.)

B. Juvenile Court Takes Jurisdiction and Places Minor in Home in September 2017

At the initial Jurisdiction/Disposition hearing, the Agency recommended that the court find the petition true and continue disposition for further assessment. (1 OCT 65.) After some placement changes, on June 25, 2017, the minor was placed with her current caregiver in a foster home in Vallejo, California. (1 OCT 71.)

In an Addendum Report, filed on July 19, 2017, the Agency recommended that the minor be placed out of home and Mother receive family reunification services. (1 OCT 77.) Mother disagreed with the recommendation and wanted the minor returned to her care. Mother also stated she wanted to be emancipated so that she could move from her legal guardian's home. (1 OCT 82.) The Agency assessed that the minor was not safe in Mother's care due to Mother's mental health needs and her unwillingness to use her family supports. (1 OCT 82.) The matter was continued for a contested hearing. (1 OCT 95-96.)

At the continued September 21, 2017 hearing, the Agency changed its recommendation and requested that the minor be returned to Mother's care with family maintenance services. (1 OCT 100.) Mother's legal guardian reported that her relationship with Mother was "going pretty good" and she continued to be committed to assisting Mother in caring for the minor. (1 OCT 104.) Mother also had additional family support to assist her. (1 OCT 104.) On September 21, 2017, the court found an amended petition true, adjudged the minor a dependent, and placed the minor in Mother's care with family maintenance services. (1 OCT 118-19.)

C. In January 2018, Less than Four Months Later, Mother Requested that the Minor Be Removed from Her Care

The minor's stay in Mother's care was short lived. On January 5, 2018, Mother spoke with her child welfare worker and reported that although it was a difficult decision, she wanted the former caregiver to care for the minor while she concentrated on finishing high school. (1 CT 18.) On that same day, Mother informed the child welfare worker that she had informally placed the minor with the former caregiver and the minor was enrolled in preschool near the caregiver's home. (1 CT 18.)

On January 16, 2018, the Agency held a Team Decision Making meeting to discuss options with Mother on providing assistance and services to mitigate barriers to parenting the minor, such as support with a referral for child care and enrollment in a high school for parenting teens. Mother reported that she was not sure if she wanted to try any of the presented resources but agreed to see if they could help her and return for a follow-up meeting. (1 CT 18.) Approximately two days later, Mother called the child welfare worker and left a voicemail message saying that she remained committed to wanting the minor placed out of her care into the care of the minor's former caregiver. (1 CT 18.) The former caregiver, Patrice J., reported that she loved the minor, was open to the minor being placed back with her, and was willing to consider adoption if necessary. The former caregiver agreed with providing liberal visitation opportunities for Mother and the minor. (1 CT 22.)

On February 14, 2018, the court again detained the minor, A.R., from Mother's care. (1 CT 33-34.) In a February 28, 2018 Jurisdiction/ Disposition Report, the Agency reported that Mother was in the eleventh grade and made the decision that she was overwhelmed caring for the minor and did not like her living situation because she and her

grandmother/legal guardian were constantly arguing about her ability to care for the minor. (1 CT 50.) The child welfare worker had called Mother twice and Mother had not returned her calls. (1 CT 50.) On February 28, 2018, the court found the Section 387 petition true, placed the minor out of home, found that Mother made minimal progress in alleviating or mitigating the causes necessitating placement, and ordered family reunification services to Mother. (1 CT 71-72.)

D. In October 2018, The Juvenile Court Terminated Mother's Reunification Services

At the six-month status review hearing pursuant to Section 366.21, subdivision (e), the Agency initially recommended that Mother receive continued reunification services. (1 CT 75.) However, Mother had not been consistent with attending school and had not been consistent in attending individual therapy. (1 CT 81.) Mother's psychiatrist believed Mother had not been taking her psychotropic medications, as she had not sought a refill in three months. (1 CT 82.) Mother was also not enrolled in her case plan required parenting classes. (1 CT 83.) Mother had failed to attend two case plan meetings with the child welfare worker. (1 CT 83.)

The minor and Mother had unsupervised weekend visits, however, Mother had not been consistent. (1 CT 85.) Issues with visitation included Mother not being home when the minor was being dropped off for the visit, and that Mother requested that the caregiver pick the minor up early because the minor was crying. (1 CT 85.) Mother reported that there were times that she felt overwhelmed during the visit. (1 CT 85.) The Agency recommended continued out of home placement because Mother had not demonstrated an ability to care for the minor. She had not started parenting classes, had not been consistent in individual therapy, or attending

psychiatry appointments, and had failed to show that the minor was a priority, or that she was willing to have custody of the minor. (1 CT 91.)

On August 30, 2018, the Agency changed its recommendation and recommended that the court terminate reunification services to Mother. (1 CT 110.) The report indicated that Mother was scheduled to start parenting classes but called at the last minute and cancelled. (1 CT 114.) Mother was offered weekly dyadic therapy with the minor to strengthen the relationship/bond and attachment between Mother and the minor and Mother reported that she would prefer to only participate every other week. (1 CT 114.) Despite Mother's preferences, dyadic therapy begun weekly in Mother's home. Mother had not attended her individual therapy for the entire month of August 2018 and had missed her psychiatry appointment. (1 CT 114, 132-33.) On October 17, 2018, the court terminated services to Mother and set a Section 366.26 hearing. (1 CT 135-137.)

Mother filed a writ petition pursuant to Rule 8.450 which was subsequently denied by the Court of Appeal, First District. (1 CT 173-180; Appeal No. A155682.)

E. In June 2019, The Juvenile Court Terminated Mother's Parental Rights

In a 366.26 WIC Report prepared for a February 6, 2019 Section 366.26 hearing date, the Agency initially recommended that the matter be continued for thirty days for a Child and Family Team Meeting to finalize the permanent plan. (1 CT 181.)

The report reviewed visitation between the minor and Mother. (1 CT 188-189.) Visits between Mother and the minor had not been consistent, and the caregiver reported that often the minor was resistant to going. (1 CT 188.) After visits, the minor tended to be hyper, hard to

soothe, very whiny, and clingy. (1 CT 188.) Due to the several visits in which Mother was not home to receive the minor, the caregiver was instructed to cancel the visit if Mother was not there. There had been visits when Mother would call to ask the caregiver to pick the minor up a day early, and even one instance when Mother ended the visit an hour after the minor was dropped off. (1 CT 189.) In September and October 2018, Mother cancelled three out of six dyadic therapy sessions with the minor and did one session by phone. (1 CT 189.)

The minor was not developmentally on task. The minor was diagnosed with Developmental Disorder of Speech and Language, Unspecified. (1 CT 191.) The minor had a lot of attachment issues. (1 CT 191.) The minor was very attached to her caregiver and would follow her from room to room. (1 CT 191.)

The Agency completed an adoption assessment on October 23, 2018 and concluded that the minor was adoptable. (1 CT 193.) She was two and half years old and in good health. Although she had developmental delays, the caregiver was seeking appropriate interventions, and the minor's delays would not preclude adoption. (1 CT 193.) The minor had been placed for about a year with a caregiver who was willing and able to adopt her. (1 CT 193.) Additionally, the minor appeared to be feeling some uncertainty around moving back and forth between two households. In her foster home, she did not like to let the caregiver out of her sight and would follow her room to room. (1 CT 193.) After the filing of the initial Section 366.26 report, the Agency was able to hold a Child and Family Team meeting and during discussions, Mother seemingly agreed to adoption. (1 CT 237, 239.)

On February 6, 2019, the court continued the Section 366.26 hearing and although Mother requested that visits go back to every weekend, the

court continued the order that visits occur every other weekend with one additional day per month of visitation. (2/6/19 RT 7.)

On April 8, 2019, Mother filed a Section 388 petition requesting that the court return the minor to her care or reinstate reunification services. (2 CT 343-356.) After hearing argument from both County Counsel and Minor's counsel, who both argued that Mother had failed to show a prima facie case for a change of court order (4/17/19 RT 1-5), the court ordered an evidentiary hearing on Mother's Section 388 petition. (2 CT 383-84; 4/17/19 RT 11-12.)

The Agency filed a Memorandum in preparation for the combined Section 388 petition and Section 366.26 hearing. (2 CT 401-08.) The Agency detailed the recent visitation between Mother and the minor. (2 CT 404.) During one visit, Mother requested that the caregivers pick the minor up a day early, as she did not have a car seat to transport the minor. (2 CT 404.) At another visit, Mother requested that the caregivers bring the minor Saturday instead of Friday, because she was tired and had "things to do." (2 CT 404.) Although the minor was not scheduled to be picked up until Monday afternoon, Mother requested that the minor be picked up earlier on that day. (2 CT 404.) The caregivers also noted that the minor appeared dysregulated after visits. The minor would use curse words, scream, and hit, including hitting the caregiver in the face. It was reported that it typically took the minor about four days to return to normal behavior. (2 CT 404.) Following the January 25, 2019 CFT meeting, Mother stopped participating in dyadic therapy with the minor on Fridays. When the therapist was able to get in contact with Mother in April 2019, Mother reported that her legal guardian no longer wanted any further therapy sessions at the home. (2 CT 405.)

The Agency commended Mother for showing strength and resourcefulness in difficult circumstances, however, it continued to maintain its recommendation for termination of parental rights. Mother continued to cut visits short and there remained concerns about the minor being exposed to family conflicts during the visits, as the minor was using profane and threatening language, and hitting people after she returned from visits. (2 CT 405.) The Agency did not necessarily think the minor's behaviors were coming from Mother, as there were several family members in the home when the minor visits, however, the visits appeared to be stressful for the minor, and she was clingy with the caregivers after they would pick her up. (2 CT 405.) The Agency stated that at this juncture, the issue was not Mother's efforts, but the minor's needs. (2 CT 405.) The minor was almost three years old and had been out of Mother's care for sixteen months. (2 CT 405.) The minor needed security and permanence and despite Mother's good intentions, Mother had been unable to provide that for her. (2 CT 405.)

On June 12, 2019, the court held the combined Section 388 and Section 366.26 hearing. (2 CT 423-425.) Mother was not present but was represented by counsel, who stated on the record that she was ready to go forward. (6/12/19 RT 1.) The court requested evidence on Mother's Section 388 petition before going forward with the Section 366.26 hearing and Mother's counsel requested that Mother's JV-180 form be admitted into evidence. (6/12/19 RT 1-2.) The court admitted the JV-180 (but not the attachments) and Mother's counsel had no other affirmative evidence to present to the court. (6/12/19 RT 3.) The court denied Mother's Section 388 petition. (*Id.*)

The juvenile court then went forward with the Section 366.26 hearing. Mother's counsel stated on the record that she was ready to go

forward with the Section 366.26 hearing. (6/12/19 RT 3.) The court admitted six Agency reports into evidence: the June 12, 2019 Memorandum, the March 20, 2019 Memorandum, the Addendum from March 20, 2019, the February 6, 2019 366.26 report and the February 6, 2019 Addendum report, and the August 16, 2018 Status Review Report. (6/12/19 RT 4-5.) All parties submitted on the Agency reports. (6/12/19 RT 5.) Mother's counsel argued for the court to apply the beneficial relationship exception and argued that perhaps the minor was dysregulated after visits because of a bond with Mother. (6/12/19 RT 7-8.) County Counsel argued that Mother had failed to meet her burden and the court should terminate parental rights. Minor's counsel agreed with the Agency's recommendation. (6/12/10 RT 6-7.) The court took the matter under submission and reviewed some of the reports and concluded that the beneficial relationship did not apply. (6/12/19 RT 9.) The court terminated Mother's parental rights. (6/12/19 RT 9-10.)

F. Mother's Trial Counsel Failed to File a Timely Notice of Appeal

On June 12, 2019, the court terminated Mother's parental rights. (2 CT 423-25.) Mother's attorney, Rita Rodriguez was present in court. (*Id.*) On August 12, 2019, the 60-day deadline within which to file a Notice of Appeal lapsed.[2] Mother's counsel filed a notice of appeal on August 15, 2019. The notice of appeal stated that Mother was appealing the denial of the JV 180 and termination of parental rights. (2 CT 432-33.)

On December 28, 2019, Mother's appellate counsel filed an Opening Brief with an application for relief from default with two declarations

[2] 60 calendar days after Wednesday June 12, 2019, is Sunday, August 11, 2019. However, this date fell on a weekend, so the next business day was Monday, August 12, 2019.

attached. Mother's declaration stated that she was unable to attend the June 12, 2019 hearing because she was in the hospital receiving treatment. (Declaration of Mariah B. at ¶¶1-3.) Mother's declaration stated that "soon" after the hearing, she contacted a social worker at East Bay Family Defenders (the nonprofit organization that employed Ms. Rodriquez), who informed Mother that her parental rights were terminated and that she had the right to appeal. Mother then declared that she informed her attorney that she wished to appeal the decision. (*Id.* at ¶¶ 6-7.)

Mother's trial counsel, Rita Rodriguez, also filed a declaration. In Ms. Rodriguez's declaration, she stated that she learned that Mother wished to file a notice of appeal on June 17, 2019. (Declaration of Rita Rodriguez at ¶ 4.) Although Ms. Rodriguez declared that her practice was to file a notice of appeal within one or two days of learning of the client's desire to do so, in this instance, she forgot and mistakenly assumed that she had filed the notice on Mother's behalf. (*Id.* at ¶¶ 5-6.) Ms. Rodriguez did not notice her mistake until August 14, 2019, and filed the notice of appeal on August 15, 2019. (*Id.* at ¶¶ 6-7.)

On January 21, 2020, the Court of Appeal, First District, denied Mother's application for default and dismissed the appeal, finding that Mother was not entitled to relief under the doctrine of constructive filing as that doctrine does not generally apply to dependency cases and the court declined to apply it in this case. (Appeal No. A158143.)

III. DISCUSSION

The Agency does not dispute that a parent in a juvenile dependency case has a right to effective assistance of counsel. If Mother and Ms. Rodriguez's declarations are to be believed, Ms. Rodriguez failed to provide effective assistance to Mother by not filing the notice of appeal in a

timely fashion after she was informed Mother wished to appeal the termination of her parental rights. In all but the rarest of cases, this failure is fatal to an appeal. Without a timely notice of appeal, the appellate court has no jurisdiction to hear the case. Due to the special need in dependency cases for finality of judgments, this Court must not reverse historical precedent. This court must not create a new exception to allow for a parent to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights and thereby allow an untimely appeal to go forward after a dependent minor has been in a safe, permanent, and stable home for years.

A. Sound Public Policy and Precedent Hold that Appellate Courts Have No Jurisdiction to Consider Untimely Appeals in Juvenile Dependency Cases

The California Rules of Court mandate that a notice of appeal must be filed within 60 days of the judgment or order being appealed. (Cal. Rules of Ct. 8.406(a)(1).) The 60-day period runs from the time the order is pronounced in open court. (*In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254.)

Late filing of a notice of appeal is an absolute bar to appellate court jurisdiction. The timely filing of a notice of appeal is an absolute prerequisite to the appellate court's jurisdiction to consider issues on appeal. (*Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864 (*Alexander S.*)) "The consequences of an untimely notice of appeal ... are not remediable." (*In re Frederick E.H.* (1985) 169 Cal.App.3d 344, 347.) A court may not extend the time to file a notice of appeal except in the extraordinarily rare event of a public emergency. (Cal. Rules of Ct. 8.66; 8.406(c).) Moreover, because the appeal deadline is jurisdictional, relief to a file a late appeal may not even be granted under Code of Civil Procedure

section 473, subdivision (b). (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 372.) "In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal, even to relieve against mistake, inadvertence, accident, or misfortune." (*Id.* at p. 473 (internal quotes omitted.)) "[T]he timely filing of a notice of appeal is a jurisdictional requirement" that the court has no power to waive. (*Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 953; *In re Frederick E.H., supra*, 169 Cal.App.3d at p. 347.)

This Court has long held that a parent cannot collaterally challenge a final non-modifiable order as it relates to child custody. In *Ex Parte Miller* (1895) 109 Cal. 643, the trial court appointed a legal guardian for a minor. The order of appointment was an appealable judgment, but the parents failed to file a notice of appeal within the limitations period and the judgment became final. (*Id.* at 646.) In order to gain custody of the child, the parents subsequently filed a petition for writ of habeas corpus to collaterally attack the final judgment appointing the guardian. (*Id.*) This Court held that habeas corpus could only be brought to collaterally attack a final child custody judgment where the superior court lacked jurisdiction to make the judgment. (*Id.* at 646.) As the superior court in this case had jurisdiction to make the order, a collateral attack was improper. (*Id.* at 647.) Since no timely notice of appeal was filed the order was final and could not be challenged.

Even when there arguably has been ineffective assistance of counsel, this Court has maintained that a timely notice of appeal is essential. In *Alexander S.*, this Court addressed the issue of whether the Court of Appeal had jurisdiction to address claims regarding a private adoption arising from a petition to withdraw consent to adoption when no appeal from that judgment was brought within the limitations period. (*Alexander S.*, *supra*,

44 Cal.3d at p. 859, as modified on denial of reh'g (May 5, 1988).) In *Alexander S.*, the mother timely appealed from a subsequent order unrelated to the order regarding her failure to withdraw her consent for the adoption and the Court of Appeal admitted that it did not have jurisdiction to reach the claims determined by the final judgment denying the petition to withdraw consent. However, the Court of Appeal elected to treat that portion of the mother's appeal as a petition for writ of habeas corpus and found that the mother had not received effective assistance of counsel in the proceedings leading to her original consent. (*Alexander S.*, *supra*, 44 Cal.3d at pp. 862-63.)

This Court reversed. After discussing several procedural errors committed by the appellate court, this Court acknowledged that habeas corpus is available as a means of collateral relief, and may serve as a belated appeal, where the basis is the ineffective assistance of counsel. (*Id.* at 865 [citing *People v. Munoz* (1975) 51 Cal.App.3d 559, 563; *People v. Glaser* (1965) 238 Cal.App.2d 819, 821-824.]) However, this Court held that adoption proceedings were not, in this respect, governed by the rules and principles applicable to criminal matters, and that with exceptions that were not relevant, "habeas corpus may not be used to collaterally attack a final nonmodifiable judgment in an adoption-related action." (*Alexander S.*, *supra*, 44 Cal.3d at pp. 867-68.) In the decision, the Court emphasized that, "there are compelling reasons for prohibiting a collateral attack by habeas corpus in an adoption case where such an attack would only result in additional delay, uncertainty and potential harm to the prospective adoptee." (*Alexander S.*, *supra*, 44 Cal.3d at p. 866.) The Court even cited United States Supreme Court precedent to support its point. "'The State's interest in finality is unusually strong in child-custody disputes. The grant of federal habeas would prolong uncertainty for children .... It is undisputed

that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged.'" (*Id.* at 868 [quoting *Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, 513-514.].)

The facts of the underlying case illustrate the wisdom of the *Alexander S.* and *Lehman* decisions. At the writing of this brief, the four-year-old minor has been living in her current home since January 2018, more than half of her lifetime. (1 CT 18.) At the time of the Section 366.26 hearings, the minor's visits with Mother had been inconsistent, and the caregiver reported that the minor was often resistant to going. (1 CT 188.) After visits, the minor tended to be hyper, hard to soothe, very whiny, and clingy. (1 CT 188.) She would use curse words, scream and hit, including hitting the caregiver in the face. It was reported that it typically took the minor about four days to return to normal behavior. (2 CT 404.) The minor appeared to be feeling some uncertainty around moving back and forth between two households. In her foster home, she did not like to let the caregiver out of her sight and would follow her room to room. (1 CT 193.) The minor's attachment issues and her dysregulation and uncertainty around moving back and forth between two households is precisely why cases involving adoption and the termination of parental rights must be final after the time for appeal has lapsed. If a parent is allowed to challenge the failure to file a timely notice of appeal it would undermine the security that dependent minors must feel who after a years-long juvenile dependency case finally have some semblance of a permanent home.

B. Exceptions to the Jurisdictional Rule are Rare and Incompatible with Juvenile Dependency Proceedings

Appellant argues that this Court should permit a parent's belated appeal to go forward if the untimeliness of the notice of appeal is due to the ineffective assistance of counsel. Appellant asserts that this Court should expand the doctrine of constructive filing to the dependency context. As demonstrated below, the doctrine of constructive filing should only be applicable to instances dealing with incarcerated persons and is incompatible with juvenile dependency proceedings for a variety of reasons including the strong public policy interest in finality and the heavy burden collateral litigation would put on an already overburdened and underfunded system if the constructive filing doctrine is expanded to include juvenile dependency proceedings.

1. The Doctrine of Constructive Filing is Primarily Applied to Incarcerated Persons

The doctrine of constructive filing was first explained by this Court in *People v. Slobodian* (1947) 30 Cal.2d 362 (*Slobodian*) which held that if a prisoner appellant in a criminal case delivered his notice of appeal to the prison authorities to be mailed to the clerk of the court well within the time prescribed by the rules on appeal, there had been a constructive filing of the notice where the prison authorities had negligently failed to forward the notice on time. In *Slobodian*, four days following the judgment, the incarcerated defendant delivered his notice of appeal to prison authorities with a request to mail it. The prison authorities negligently failed to forward the notice in a timely manner and the notice of appeal was received five days late. (*Id.* at 366.) The Court emphasized that the defendant had placed the notice in the hands of the prison authorities with ample time, the defendant was powerless to prevent the delay by state employees, and thus

the untimeliness of the notice was attributable entirely to the state employees. (*Slobodian*, *supra*, 30 Cal.2d at pp. 366-67.) Because it was the state employees' fault for the delay, it would have been absurd for the state to then deny a defendant the right of the appeal. (*Id.*) The Court stated that "when appellant timely deposited his notice of appeal with the state's employees as required by the state prison rules, such action constituted a constructive filing of the specified notice." (*Id.* at 366-67.) By forwarding his notice of appeal six days prior to the expiration date, the defendant had constituted a constructive filing within the time limit and satisfied the jurisdictional requirement. (*Id.* at 367-68.) Following *Slobodian*, several appellate courts applied the doctrine of constructive filing in that factual context. (*See e.g., In re Gonsalves* (1957) 48 Cal.2d 638, 645-46; *People v. Howard* (1958) 166 Cal.App.2d 638, 640-43.)

The constructive filing doctrine was then expanded. First, it was expanded to include a situation where the incarcerated defendant delivered his notice of appeal to prison authorities on the due date for the notice of appeal. (*See People v. Dailey* (1959) 175 Cal.App.2d 101, 104.) Appellate courts also extended the doctrine to situations where the incarcerated defendant's notice of appeal was not timely filed because he relied on the conduct or representations of prison officials which lulled him into a false sense of security. (*People v. Calloway* (1954) 127 Cal.App.2d 504.) The *Calloway* court extended the doctrine stating that the defendant "tends to make a prima facie showing that defendant was lulled into a false sense of security by a representative of the state, the opposite party in the litigation" and the facts "come close enough to the exception to the rule stated in *People v. Slobodian*." (*Id.* at 506-07.) In *People v. Head* (1956) 46 Cal.2d 886 (*Head*), this Court explicitly extended the doctrine of constructive filing to a factual situation that included a incarcerated defendant, who did

not have counsel and did not know what the time limitation on filing an appeal was, and had relied on a correctional officer's representation that his notice would be prepared on time. In *Head*, the incarcerated defendant made attempts to see that his notice was prepared and was unable to obtain the completed notice until after the time to appeal had lapsed. This Court stated, "[i]t thus appears that defendant filed the notice of appeal timely as far as was possible for him to do so or was lulled into a sense of security by the prison official's advice, it would appear that he should not be deprived of his appeal." (*Id.* at 889.)

The doctrine of constructive filing was then expanded again by this Court in *In re Benoit* (1973) 10 Cal.3d 72 (*Benoit*). In *In re Benoit*, the Court held that an incarcerated criminal defendant who showed reliance on his attorney to file notices of appeal was entitled to invoke the principle of constructive filing to his notices of appeal. However, *Benoit* did not permit the indiscriminate application of the constructive filing doctrine to all criminal cases in which it could be argued that there had been "ineffective assistance of counsel" in failing to file a timely notice of appeal. Rather, in the interests of justice, the *Benoit* court extended the doctrine to apply in situations where the defendant is incarcerated or otherwise in custody, had been properly notified of his appeal rights, and had made arrangements with his trial attorney to file a notice of appeal for him. (*Id.* at 86.) The facts of *Benoit* showed that the defendant was particularly diligent. He told his trial counsel immediately following sentencing that he wanted to appeal, he had informed a different appointed attorney of the appeal and requested that this new attorney follow-up. (*Id.* at 87.) The new attorney inquired of his previous trial counsel and was assured that the notice of appeal was being processed. The defendant continued to insist, and his new attorney rechecked and discovered that a notice had not been filed, and then

filed what he thought was a timely notice of appeal. (*Id.*) The defendant's diligence was central to the Court's finding. It stated it would "not indiscriminately permit a defendant whose counsel has undertaken to file the notice of appeal, to invoke the doctrine of constructive filing when the defendant has displayed no diligence in seeing that his attorney has discharged this responsibility." (*Id.* at 89.)

Although the doctrine has been expanded over time, this Court has made clear that the theory of the doctrine of constructive filing generally, and what has come to be known as the prison-delivery rule more specifically, relies heavily upon the unique situation of the incarcerated person, particularly those who are self-represented.

> Unlike other litigants, pro se prisoners cannot personally travel to the courthouse to see that the notice is stamped 'filed' or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the pro se prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private express carrier); and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. Pro se prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them.

(*In re Jordan* (1992) 4 Cal.4th 116, 128-29 [quoting *Houston v. Lack*, (1988) 487 U.S. 266, 270-71].)

More recently in *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106 (*Silverbrand*), this Court adopted the reasoning of previous precedent and expanded the prison-delivery rule to include notice of appeals in civil actions sent by self-represented incarcerated persons. (*Silverbrand, supra,* 46 Cal.4th at pp. 119-23.) The *Silverbrand* court noted that the national trend was to extend the prison-delivery rule to other filings by self-represented incarcerated litigants. "This trend is not surprising in view of the circumstance that the outcome in *Houston* rested not upon the type of document filed or the nature of the litigation involved, but upon the self-represented prisoner's lack of control over the filing of legal documents and upon administrated benefits associated with the prison-delivery rule." (*Id.* at 124.)

In sum, constructive filing of a notice of appeal by a self-represented prisoner, whether it be in a criminal or a civil case, is deemed filed as of the date the prisoner properly submits the notice to prison authorities for forwarding to the superior court. (*Silverbrand, supra,* 46 Cal.4th at p. 129.) This rule is compelled by a fundamental rule of equal access for self-represented prisoners, so they are not denied access to the appellate courts due to obstacles to the timely filing of a notice of appeal that other litigants could readily overcome. (*Id.*; *see also Slobodian, supra,* 30 Cal.2d at p. 365; *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1487 ["all courts have an obligation to ensure [prison] walls do not stand in the way of affording litigants with bona fide claims the opportunity to be heard."].)

2. Constructive Filing Doctrine Has Also Been Applied When the Trial Court Improperly Asserted Jurisdiction

Appellant cites *People v. Snyder* (1990) 218 Cal.App.3d 480 for the proposition that the constructive filing doctrine had been expanded to

include non-incarcerated litigants. However, *People v. Snyder* did not expand the doctrine in such a way. Rather, it should be limited to its facts where the failure to timely file a notice of appeal resulted from a trial court's improper assertion of jurisdiction. In *People v. Snyder*, the People failed to file a timely appeal because they were "lulled into a false sense of security" by the court's improper assertion of jurisdiction. (*Id.* at 492-93.) At least two courts have concluded, on analogous facts, that a court's improper assertion of jurisdiction can provide justification for permitting a late-filed appeal. (*See People v. Martin* (1963) 60 Cal.2d 615, 618-619 [holding that the defendant's failure to file resulted from the trial court's agreeing to hear a new trial motion, when it lacked jurisdiction; the trial court's conduct, which induced the filing error, should not cause the right to appeal to be forfeited]; *People v. Hales* (1966) 244 Cal.App.2d 507.) Even the *Snyder* court recognized that its holding was limited to the precise facts of that case. (*See Snyder, supra,* 218 Cal.App.3d at p. 493 n.8.) In any case, the reasoning of *Snyder* is inapplicable generally in dependency, as there are no provisions for a motion for new trial. Furthermore, this is not a case where the appellant was "misled" into a delayed filing because the trial court erroneously agreed to consider a jurisdictionally invalid motion.

C. The Constructive Filing Doctrine Is Inapplicable to Juvenile Dependency Proceedings Due to Differing Policy Considerations

As detailed above, the doctrine of constructive filing was a judicial creation based on the theory of fundamental fairness for pro se incarcerated persons. While the doctrine has been expanded to include both civil and criminal filings, and to include those prisoners who were lulled into a sense of security by either prison authorities or appointed counsel, it should not

be expanded to include parents in a juvenile dependency proceeding due to the differing policy considerations that inform juvenile dependency law.

1. A Parent in a Juvenile Dependency Proceeding Is Not Physically Barred from Access to the Court

Unlike an incarcerated person, a parent in a juvenile dependency proceeding[3] does not have the same kind of barriers to access the courts. Unlike a person in custody, a parent in a juvenile dependency proceeding could personally travel to the courthouse to ensure that the notice has been filed or to establish the date on which the court received the notice. The parent need not rely on prison authorities to ensure that a notice of appeal is sent to the superior court. Rather, parents can choose to use mail or personally deliver the notice of appeal. A parent can call the court to determine whether the notice has been received and stamped. None of the considerations that compel a constructive notice filing in a prisoner case apply to a parent in a juvenile dependency proceeding.

Appellant asserts that this Court should expand the doctrine of constructive filing 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. While equality of access to the courts is an important goal, that goal by itself does not warrant the extension of a judicial created doctrine to juvenile dependency proceedings. Much like many parents in the dependency system, there are many criminal defendants and civil litigants who are poor, uneducated, or members of a minority group, to which the doctrine of constructive filing does not apply. The doctrine of constructive filing is compelled only when the litigant is literally barred by prison walls from accessing the courts and the litigant

[3] Unless, of course, the parent was incarcerated at the time.

must depend entirely on state actors to have an appeal filed. (*Silverbrand, supra*, 46 Cal.4th at p. 129; *Slobodian, supra,* 30 Cal.2d at p. 365.) Parents in juvenile dependency proceedings are not similarly situated.

2. There Is a Special Need for Finality in Juvenile Dependency Proceedings

Additionally, as demonstrated by the many courts that have rejected the notion that the doctrine of constructive filing should be applicable in juvenile dependency cases, there is a special need for speedy resolution and finality. "Of the many private and public concerns which collide in a dependency proceeding, time is among the most important." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152 [citing *In re Sade C.* (1996) 13 Cal.4th 952, 987].) The state's interest in expedition and finality in dependency proceedings is "strong." (*In re Sade C., supra*, 13 Cal.4th at p. 993.) "The child's interest in securing a stable 'normal' home 'support[s] the state's particular interest in finality.'" (*In re Meranda P., supra,* 56 Cal.App.4th at p. 1152 [quoting *In re Sade C., supra,* 13 Cal.4th at p. 993].) To allow a parent to pursue a belated appeal[4] would undermine the state's and the minor's interests in finality and timely resolution.

This Court must follow the sound reasoning of *In re Issac J.* (1992) 4 Cal.App.4th 525. In *In re Issac J.*, the Court of Appeal, Fourth District, dismissed a petition for habeas corpus and held that the doctrine of constructive filing under *In re Benoit* (1973) 10 Cal.3d 72 does not apply to termination of parental rights judgments. (*In re Isaac J., supra,* 4 Cal.App.4th 525.) In *Issac J.*, a father filed an untimely notice of appeal

[4] While in this case, Mother's attorney noticed her error only a few days after the time for filing a notice of appeal lapsed, one can imagine a case where the error is not discovered for several months.

from a judgment declaring his minor children free from his custody pursuant to former California Civil Code section 232.[5] After the father's appeal was dismissed, he filed a petition for habeas corpus requesting that his appeal be reinstated or, in the alternative to raise certain issues in a collateral attack on the judgment rendered by the trial court. (*Id.* at 528.)

The *Issac J.* court then went through the history of reported cases that addressed the issue, including *In re Fredrich E.H.* (1985) 169 Cal.App.3d 344 and *In re A.M.* (1989) 216 Cal.App.3d 319. In *In re Fredrick E.H.* (1985) 169 Cal.App.3d 344, 347 the Court of Appeal, Fourth District held that the failure to file a timely notice of appeal in a proceeding under Civil Code section 232 deprived the appellate court of jurisdiction to hear the appeal. This holding was in accordance with the law generally applicable to civil cases. (*See e.g. Hollister Convalescent Hosp. v. Rico* (1975) 15 Cal.3d 660, 666-67.)

Then, in *In re A.M.* (1989) 216 Cal.App.3d 319, the appellate court contended that a Rule of Court amendment impliedly incorporated the doctrine of constructive filing to juvenile court cases. Assuming, without deciding, that this construction was correct, the *A.M.* court nevertheless found the doctrine inapplicable citing the "special need for finality in cases

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[5] Petitioner argues that appellate decisions discussing the application of the constructive filing doctrine to former Civil Code section 232 proceedings are not dispositive. (AOB at 52.) While Petitioner is correct that prior to 1989, dependency proceedings under Section 300 were separate from actions which terminated parental rights under former Civil Code section 232, meaning that previous decisions referring to "dependency proceedings" or "section 300 proceedings" under the old statutes did not contemplate that the termination of parental rights was at issue. (*See In re Kristin H* (1996) 46 Cal.App.4th 1635, 1660-61.) However, all decisions referring to Civil Code Section 232 proceedings were expressly contemplating the termination of parental rights and those decisions should be deemed persuasive authority, if not dispositive.

under [former Civil Code] section 232," and noting the danger of imperiling adoption proceedings, the court found it inappropriate to extend the doctrine of constructive filing to appeals involving the termination of parental rights. (*In re A.M., supra,* 216 Cal.App.3d at p. 322.)

The *Issac J.* court agreed that the doctrine of constructive filing should not be indiscriminately extended to cases involving the termination of parental rights. Rightly, the court found that because there is a due process right to counsel there is an accompanying right to effective assistance of counsel and considered whether because parents have a right to the effective assistance of counsel impacts whether the doctrine of constructive of filing should be applicable to termination of parental rights orders. (*Isaac J., supra* 4 0Cal.App.4th at pp. 531-32.) The court acknowledged that "to make the guarantee of counsel genuine, a parent must be permitted to raise ineffective assistance of counsel on appeal, it may very plausibly be argued that he must be given a concomitant right to pursue his appellate rights despite his attorney's inexcusable failure to perfect the appeal in a timely fashion." (*Id.* at 532.) However, the court found that when the parent's interest and the minor's interest collide, the minor's interest in finality should prevail. (*Id.*)

> We concede that the result will be harsh in some cases, and may be so here. We have considered the desirability of a more flexible standard, but can formulate no rules for the applicability of such a standard under which we could confidently predict that more good would be done than harm. In reviewing an application, the appellate court would be in a poor position to evaluate the merits of the proposed appeal, or the effect of the delay on the child. In some cases, such as this one, the parent may have acted diligently and been the victim of attorney incompetence—but this should not require relief if the judgment appears sound and the child is happily placed. Nor should a

> dilatory parent be allowed to proceed, if the appellate court believes, on limited information, that some error occurred at trial. Further, the court is uninformed of the child's current circumstances, and cannot resolve contradictory assertions by the parties.

(*Issac J., supra*, 4 Cal.App.4th at p. 534.)

Just last year, the Court of Appeal, Fourth District confronted the issue of an untimely notice of appeal in *In re J.A.* (2019) 43 Cal.App.5th 49. In that case, Mother was appealing the jurisdiction and disposition orders of the juvenile court but filed her notice of appeal sixteen months after the case was dismissed. (*In re J.A., supra,* 43 Cal.App.5th at p. 51.) Mother argued that the untimeliness of her appeal should be excused because the court failed to provide a writ or appeal advisement. (*Id.* at 55.) The appellate court held that, there is "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." (*In re J.A., supra* 43 Cal.App.5th at p. 56.) Put another way, even when the juvenile court, a state actor, fails a parent by violating rules of court put in place precisely to ensure that parents have the ability to take an appeal, the policy goal of ensuring that juvenile orders are final after the time for appeal has passed remains paramount. "The purpose of appeal deadlines is 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." (*Id.* at 56 [citing *In re Marilyn H.* (1993) 5 Cal.4th 295, 308].)

Authorizing parents to attack a final termination order by means of challenging ineffective of assistance of counsel after the time for appeal has lapsed would "sabotage the apparent legislative intention to expediate dependency cases and subordinate, to the extent consistent with

fundamental fairness, the parent's right of appeal to the interests of the child and state." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1156 [citing *In re Marilyn H.* (1993) 5 Cal.4th 295, 310].) Time and again this Court has held that the compelling interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful requires "the court to concentrate its efforts, once reunification services have been terminated, on the child's placement and well-being, rather than on a parent's challenge to a custody order." (*In re Marilyn H., supra,* 5 Cal.4th at p. 307.) In order to uphold that compelling legislative interest, this Court must continue to affirm that a failure to file a timely notice of appeal is fatal to a parent's claim regardless of the reason for the failure.

3. Expanding the Constructive Filing Doctrine Would Overburden Dependency Courts

Finally, in contrast with the constructive filing doctrine in the prison context, if the doctrine were expanded to include parents in a juvenile dependency proceeding, it would create an administrative nightmare. As this Court previously emphasized, the prison delivery rule advanced judicial economy by holding that the notice of appeal was constructively filed on the day that the prisoner delivered it to the prison authorities without a showing that it was given sufficiently in advance for the mail to get to the clerk's office. (*Silverbrand*, *supra*, 46 Cal.4th at p. 119 [quoting *In re Jordan, supra*, 4 Cal.4th at p. 129, italics omitted].) The Court specifically stated:

> …application of such an amorphous standard, on a case-by-case basis, would impose an extreme burden upon the courts. In light of the uncertainty involved in mail delivery, the length of time 'normally' needed to ensure timely delivery is subject to abridgment by

> numerous variables beyond the prisoner's control.... In view of the increased demands upon our appellate courts, it is not the best use of judicial resources to require those courts in such situations to make determinations as to whether notices of appeal transmitted by individual prisoners were processed in the 'normal course' of events.

(*Id.* [quoting *In re Jordan, supra*, 4 Cal.4th at 129-30].)

In fact, the *Silverbrand* court found that the administrative benefits of the prison-delivery rule to civil cases to be persuasive support to apply the bright-line rule apply to both civil and criminal appeals filed by self-represented inmates in California's congested courts. (*Id.* at 120.) The Court sought to avoid, "uncertainty for court clerks" and "time-consuming collateral litigation in the appellate courts over nonsubstantive issues." (*Id.*)

While in the prison context, the mailing system is monitored in such a way that it is a simple administrative task to determine when a prisoner personally delivered to prison authorities a notice of appeal, there is no analog in dependency, especially if a parent is contending that their counsel provided ineffective assistance of counsel. Instead, to determine whether to consider the notice of appeal "constructively filed," there would be the exact uncertainty for court clerks and time-consuming collateral litigation that this Court has previously sought to avoid. As even Appellant pointed out, in Section 366.26 fast-track appeals, the typical appellate process may take a year or more to resolve. (AOB at 58.) Importing the doctrine of constructive filing into dependency would cause continued delay in the finalization of the termination of parental rights. Even in this case, the appellate court would have to review Mother and her trial counsel's declarations which allege that Mother informed her trial counsel that she wanted to appeal within the time period to appeal. This type of collateral

litigation would cripple the already overburdened and underfunded juvenile dependency system.

D. If This Court were to Reverse Precedent and Sound Public Policy to Permit a Parent to Challenge Ineffective Assistance of Counsel for the Untimely Filing of a Notice of Appeal, It Must Impose a Heightened Standard

One must remember that there are significant safeguards built into the dependency system, which tend to work against the wrongful termination of parental rights, even if a parent is poorly represented. The dependency scheme is a "remarkable system of checks and balances." (*In re Andrew B.* (1995) 40 Cal.App.4th 825, 865.) "The number and quality of the judicial findings that are necessary preconditions to termination convey very powerfully to the fact finder the subjective certainty about parental unfitness and detriment required before the court may even consider ending the relationship between natural parent and child." (*Cynthia D. v. Superior Court of San Diego County* (1993) 5 Cal.4th 242, 255-56.) "[T]hat a parent lacked counsel or had the services of incompetent counsel does not mean the parent was in fact harmed as a consequence. Neither the absence nor the blunder of appointed counsel alone entitles the parent to obtain the appellate relief he or she seeks." (*Meranda P., supra,* 56 Cal.App.4th at pp. 1152-53.) Because of these safeguards and the compelling interest in finality of juvenile dependency proceedings, if the Court were to reverse precedent and allow a challenge, it must impose a heightened standard.

1. A Petition for Writ of Habeas Corpus is the Proper Procedure for Asserting an Ineffective Assistance of Counsel Claim in Juvenile Dependency Proceedings

Appellant asserts that a parent in a juvenile dependency case should be able to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights under Section 366.26 through a simple noticed motion. However, a simple noticed motion is insufficient for the showing that must be required to potentially destabilize the placement for a dependent minor.

A claim of ineffective assistance of counsel in a dependency matter is generally cognizable in the Court of Appeal on a petition for writ of habeas corpus. (*In re Kristin H., supra* 46 Cal.App.4th at pp. 1658-59.) That is because habeas corpus may be "used in various types of child custody matters." (*See, e.g., In re Darlice C.* (2003) 105 Cal.App.4th 459, 466 [parent is "entitled to seek review of the termination order by petition for writ of habeas corpus"]; *In re Carrie M.* (2001) 90 Cal.App.4th 530, 535.) The "writ will lie when a person entitled to custody of a minor child is denied possession thereof." (*In re Barr* (1952) 39 Cal.2d 25, 27; cf., *Alexander S., supra,* 44 Cal.3d at pp. 867-68.) Because habeas petitions have been recognized as proper vehicles for raising claims of ineffective assistance of counsel in dependency proceedings, (*In re Kristin H., supra*, 46 Cal.App.4th at pp. 1658, 1663; *In re Carrie M., supra,* 90 Cal.App.4th at pp. 533-34), if the 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 under Section 366.26, it must do so through a habeas petition.

Regardless of the nature of the proceeding in which the habeas petition arises, the court "must abide by the procedures set forth in Penal Code sections 1473 through 1508." (*Alexander S., supra,* 44 Cal.3d at p.

865.) Under those statutes, the "habeas corpus proceeding begins with the filing of a verified petition for a writ of habeas corpus." (*People v. Romero* (1994) 8 Cal.4th 728, 737, as modified on denial of reh'g (Jan. 5, 1995).) This is an important distinction between a habeas petition and a motion. The habeas petition must be verified. If the court determines that the petition does not state a prima facie case for relief or that the claims are all procedurally barred, the court will deny the petition outright as a summary denial. (*Id.* at 737.) Whenever "a habeas corpus petition is sufficient on its face (that is, the petition states a prima facie case on a claim that is not procedurally barred), the court is obligated by statute to issue a writ of habeas corpus." (*Id.*) Alternatively, the court may issue an order to show cause. (*Id.* at 738.) The writ or order to show cause "is the means by which issues are joined (through the return and traverse) and the need for an evidentiary hearing determined." (*People v. Romero, supra*, 8 Cal.4th at p. 740.)

The habeas statutes also address the conduct of hearings. (*See* Pen. Code, §§ 1483, 1484.) The court has "full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." (Pen. Code, § 1484.) "Once the court has issued a writ of habeas corpus it has the power to dispose of the matter 'as the justice of the case may require.'" (*In re Brindle* (1979) 91 Cal.App.3d 660, 669 [quoting Pen. Code, § 1484].) These additional safeguards are not necessarily available if a parent need only file a motion to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights.

Additionally, a writ petition seeking extraordinary relief must be filed within a reasonable time. (*Kristin H., supra,* 46 Cal.App.4th at p.

1659.) Untimeliness may in many cases preclude review of claims of ineffective assistance of counsel. (*See, e.g., In re Issac J., supra*, 4 Cal.App.4th at p. 534.) "Nowhere is timeliness more important than in a dependency proceeding where a delay of months may seem like 'forever' to a young child." (*Kristin H., supra*, 46 Cal.App.4th at p. 1667 [citing *In re Micah S.* (1988) 198 Cal.App.3d 557, 566 (conc. opn. of Brauer, J.).] In addition to a timely filed petition, the parent must also show diligence in attempting to endure that the notice of appeal was filed. (*In re Benoit, supra,* 10 Cal.3d at p. 89.)

In cases where the competence of counsel is at issue, "there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of." (*People v. Pope* (1979) 23 Cal.3d 412, 426.) To assert a claim of ineffective assistance, a petitioner must allege that the performance of trial or appellate counsel fell below an objective standard of reasonableness under prevailing professional norms and was therefore deficient. He or she must also claim there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*In re Cody R.* (2018) 30 Cal.App.5th 381, 394, as modified (Jan. 7, 2019) [citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-88, 693-94; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1407-08)].)

In re Kristin H. counsels that a violation of a statutory right to counsel is properly reviewed under the harmless error test enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*In re Kristin H., supra*, 46 Cal.App.4th 1635). (*See, e.g., In re Justin L.* (1987) 188 Cal.App.3d 1068, 1077 [concerning statutory right to self-representation]; *In re Nalani C.* (1988) 99 Cal.App.3d 1017; *In re Ronald R.* (1995) 37 Cal.App.4th 1186.) Therefore, 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." (*Kristin H., supra*, 46 Cal.App.4th at pp. 1667-68 [quoting *People v. Watson*, *supra*, 46 Cal.2d at p. 836].) Thus, a parent must show both that his or her trial counsel was deficient and, that if the notice of appeal had been timely filed, it was reasonably probable it would succeed. This additional requirement would ensure that a meritless appeal would not additionally delay permanence for a dependent minor.

2. Under the Petition for Writ of Habeas Standard, Mother's Claim Would Fail

If Mother's and her trial counsel's declarations are to be believed, Mother's trial counsel was informed that Mother wanted to appeal the juvenile court's termination of her parental rights and failed to file a timely notice of appeal. Even if true, that fact that there was ineffective assistance of counsel does not end the inquiry. Mother must then show that if the appeal was not dismissed for lack of jurisdiction, and the appellate court permitted her appeal to go forward, that it would be reasonably probable that she would get a more favorable result. (*Kristin H., supra* (1996) 46 Cal.App.4th at pp. 1667-68.) Essentially, Mother must show a likelihood of success of her appeal. Here, Mother is unable to make that showing.

a. Mother's Arguments Regarding Her Section 388 Petition are Factually Incorrect

Because Mother submitted her Opening Brief to the Court of Appeal with her application for relief from default, this Court can evaluate the likelihood of success of Mother's appeal. Mother first argues that the juvenile court erred in denying her an evidentiary hearing on her Section 388 petition. (Mother's AOB at 22-31.) Mother asserts that on April 8, 2019, the juvenile court found that Mother had made a prima facie

showing, and scheduled the hearing on Mother's Section 388 petition. Then on June 12, 2019, Mother's counsel and Counsel for the Agency argued on the admissibility of letters attached to the JV-180 form submitted by Mother.

Mother asserts that then the court denied Mother's Section 388 petition without an evidentiary hearing and argues that the failure to hold a hearing was an abuse of discretion and violated her due process rights. But that is not what happened at the June 12, 2019 hearing. Mother's counsel stated on the record that she was ready to go forward on the Section 388 hearing. (6/12/19 RT 1.) The court requested evidence on Mother's Section 388 petition before going forward with the Section 366.26 hearing and Mother's counsel requested that Mother's JV-180 form be admitted into evidence. (6/12/19 RT 1-2.) The court admitted the JV-180 (but not the attachments) and Mother's counsel had no other affirmative evidence to present to the court. (6/12/19 RT 3.) After holding an evidentiary hearing and hearing argument, the court denied Mother's Section 388 petition. (*Id.*)

Thus, Mother's counsel did in fact present evidence regarding the Section 388 petition. Mother's counsel requested that the court admit the JV-180 and chose not to present additional evidence in support of the JV-180. This was no summary denial. The court requested evidence and Mother's counsel presented none, save for the JV-180 form. (6/12/19 RT 3.) Because there was, in fact, a hearing on Mother's Section 388 petition, Mother's arguments regarding the denial of a hearing are without merit.

b. Mother Failed to Meet Her Burden that the Beneficial Relationship Exception Applied

Mother then asserts that the juvenile court order terminating her parental rights should be reversed because there was sufficient evidence

that the beneficial relationship exemption applied. (Mother's AOB at 31.) The record does not support application of the exception.

Once the juvenile court terminates reunification services and determines the child is adoptable, it "must order adoption and its necessary consequence, termination of parental rights, unless one of the specified" exceptions stated in Section 366.26, subdivision (c)(1) "provides a compelling reason for finding that termination of parental rights would be detrimental to the child." (*In re Celine R.* (2003) 31 Cal.4th 45, 53; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 645.)

The exception at issue in this case – the beneficial parental relationship exception – applies if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Section 366.26(c)(1)(B)(i).) The parent bears the burden of establishing the existence of the exception, which applies only in "extraordinary" cases. (*See In re K.P.* (2012) 203 Cal.App.4th 614, 621.)

The court considers two prongs when determining whether a parent has met her burden to establish the beneficial relationship exception. The first prong examines the consistency of the parent's visitation with the child. (*In re Grace P.* (2017) 8 Cal.App.5th 605, 612.) "Regular visitation exists where the parents visit consistently and to the extent permitted by court orders." (*In re I.R.* (2014) 226 Cal.App.4th 201, 212.)

The second prong involves a more nuanced analysis and requires a parent to prove that the bond she shares with her child "is sufficiently strong that the child would suffer detriment from its termination." (*In re Grace P., supra*, 8 Cal.App.5th at p. 613; *accord In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643 [a "beneficial relationship 'is one that "promotes

the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents"'"].)

To meet her burden, Mother must do more than show frequent, loving contact, an emotional bond with the child, or pleasant visits; she must show that she occupies a parental role in her son's life. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527, *disapproved on another ground in Conservatorship of the Person of O.B.* (July 27, 2020, S254938) ___Cal.5th___ [2020 Cal. LEXIS 4646].) As recognized in *In re Autumn H.* (1994) 27 Cal.App.4th 567 (*Autumn H.*), "[i]nteraction between [a] natural parent and child will always confer some incidental benefit to the child. . . . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*Id.* at 575.)

Some courts have reviewed a juvenile court's order on the beneficial relationship exception for substantial evidence others have applied the abuse of discretion standard. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1166 and n.7; *Autumn H., supra*, 27 Cal.App.4th at pp. 575-577 [applying substantial evidence standard]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*) [applying abuse of discretion standard but recognizing difference in standards not significant]; *In re E.T.* (2018) 31 Cal.App.5th 68, 78 [applying combination of both standards].)

The *Jasmine D.* court stated that the practical differences between the two standards in evaluating the beneficial relationship exception are not significant. (*Jasmine D., supra*, 78 Cal.App.4th at p. 1351 ["'[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the

trial court's action, no judge could reasonably have made the order.' " ' "].) On this record, the juvenile court's order terminating Mother's parental rights would be affirmed under either standard.

The juvenile court found A.R. adoptable at the conclusion of the June 12, 2019 hearing, and Mother does not challenge this finding on appeal. The court, therefore, was required to terminate parental rights and select adoption as A.R.'s permanent plan, unless Mother proved a "compelling reason for determining that termination would be detrimental to the child" under one of the statutory exceptions such as the beneficial relationship exception. (Section 366.26(c)(1)(B); *see In re Celine R., supra*, 31 Cal.4th at p. 53.)

As to the first prong, Mother asserts that she enjoyed regular unsupervised weekend visits throughout the course of the dependency matter and thus, she satisfied the first prong of the beneficial relationship exception. (Mother's AOB at 33.) Mother's characterization is an oversimplification of the facts. While true that the court visitation order throughout most of the dependency case was unsupervised weekend visits, Mother was, in fact, not consistent. (1 CT 85, 188.) At the time of the six-month status review hearing, the Agency reported issues with visitation, including Mother not being home when the minor was being dropped off for the visit, and that Mother requested that the foster parent pick the minor up early because the minor was crying. (1 CT 85.) In the initial Section 366.26 hearing report, the Agency report was that visits between Mother and the minor had not been consistent, and the caregiver reported that the minor was often resistant to going. (1 CT 188.) Due to the several visits in which Mother was not home to receive the minor, the caregiver was instructed to cancel the visit if Mother was not there. (1 CT 189.) There had been times when Mother would call to ask the caregiver to pick the

minor a day early, and even one instance when Mother ended the visit an hour after the minor was dropped off. (1 CT 189.) In September and October 2018, Mother cancelled three out of six dyadic therapy sessions with the minor and did one session by phone. (1 CT 189.) During one visit, Mother requested that the caregivers pick the minor up a day early, as she did not have a car seat to transport the minor. (2 CT 404.) At another visit, Mother requested that the caregivers bring the minor Saturday instead of Friday, because she was tired and had "things to do." (2 CT 404.) Although the minor was not scheduled to be picked up until Monday afternoon, Mother requested that the minor be picked up earlier that day. (2 CT 404.) Mother was not visiting with the minor consistently and to the extent permitted by court orders.[6] Rather, Mother would often not be home when the visit was supposed to start and frequently ended the visits early.

Even assuming that there was sufficient evidence that Mother met the first prong of the beneficial relationship exception – which she did not – there quite clearly was no evidence to show that Mother occupied a parental role for the minor, or that terminating parental rights would deprive the minor of a substantial, positive emotional attachment such that the minor would be greatly harmed by the termination of parental rights.

Mother's Opening Brief argues that the minor was in Mother's exclusive care for fourteen months and that through the unsupervised weekend visits, Mother was responsible for the minor's day-to-day needs. Yet again, Mother's version of the facts is not supported by the record. At all times that Mother was caring for the minor, she was living in the home of her legal guardian. The incident that underlies the Section 300 petition was that Mother's legal guardian was watching the minor when Mother

[6] It should be noted that even after the termination of parental rights Mother continued to have issues with visitation. (*See* 2 SOCT 484.)

attempted suicide in her room. (1 OCT 17.) When Mother requested that the minor be removed from her care in January 2018, she reported that she and her legal guardian were arguing about the care she was giving the minor. (1 CT 50.) The Agency reports detailed that there were several people in the home with Mother during the visits (2 CT 405), thus, it is likely she was not managing the day to day needs of the minor while on visits. As noted above, Mother would often not even be at the home when the visits were supposed to start. (1 CT 85, 188.)

At the time that Mother's parental rights were terminated, A.R. had spent most of her young life in the home of her caregiver. She had been continuously in the home of the caregiver for approximately eighteen months and the minor was only three years old. (*See* 2 CT 401-02.) Further, Mother's assertion that the relationship minor and Mother had was a positive one, is belied by the record. After visits, the minor tended to be hyper, hard to soothe, very whiny, and clingy. (1 CT 188.) The minor suffered from a lot of attachment issues (1 CT 191) and appeared to be feeling some uncertainty around moving back and forth between two households. In her foster home, she did not like to let the caregiver out of her sight and would follow her room to room. (1 CT 193.) Following visits with Mother, the minor would use curse words, scream, and hit, including hitting the caregiver in the face. It was reported that it typically took the minor about four days to return to normal behavior. (2 CT 404.) This is not evidence of a positive emotional bond between the minor and the Mother.

Put simply, Mother's appeal would fail and the juvenile court's order terminating her parental rights would be easily affirmed. Mother could not show that she was prejudiced by her trial counsel's failure to file a timely notice of appeal. While Mother's trial counsel's failure was certainly an

egregious error of jurisdictional proportions, the ultimate order would remain unchanged. This must be an important factor when considering whether to resurrect a belated termination of parental rights appeal.

In juvenile dependency proceedings, time marches on and there are no static conditions. In contrast, in criminal or civil cases, "the factual scenario is established; it will not change; a retrial can be staged upon the same facts and law as governed the first trial; and the issue of prejudice can be determined solely by viewing the status of affairs as they were when the negligence of counsel occurred." (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 243-44.) Meanwhile, if this Court permitted Mother to appeal an order made over a year ago, it most certainly would subvert the strong Legislative goals emphasizing finality, stability, and permanence for dependent minors.

IV. CONCLUSION

This Court asked whether 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 under Welfare and Institutions Code section 366.26. In answering this question, 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. It may seem harsh, especially when the inadequacy of trial counsel was so egregious. However, the alternative will do more harm to the thousands of dependent minors who await finality of their years-long dependency proceedings so they can achieve true permanence in a safe and stable home.

If, in the alternative, the Court permits a parent to resurrect a belated appeal of the termination of their parental rights through a claim of

ineffective assistance of counsel, this Court at a minimum must require that parent to show that they were prejudiced by their counsel's failure to file a timely notice of appeal. Specifically, the parent must show that they have a likelihood of success on the merits if that parent wants to disrupt the safe, stable, and permanent home of a dependent minor.

DATED: August 17, 2020

DONNA R. ZIEGLER,

County Counsel in and for the
County of Alameda, State of California

By */s/ Samantha N. Stonework-Hand*
Samantha N. Stonework-Hand
Deputy County Counsel

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ALAMEDA COUNTY SOCIAL
SERVICES AGENCY

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504, subdivision (d)(1), 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 to Petition was produced, the Answer contains approximately 12,878 words.

Executed on August 17, 2020, in Oakland, California.

By: */s/ Samantha N. Stonework-Hand*
Samantha N. Stonework-Hand

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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electronic mail was consistent with the requirements of California Rules of Court, rules 8.44 and 8.78. My electronic service address is frances.chen@acgov.org

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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 August 17, 2020.

/s/ *Frances F. 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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8/17/2020

Date

/s/Frances Chen

Signature

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