IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**In re A.R.**, A Person Coming Under the Juvenile Court Law.

**ALAMEDA COUNTY SOCIAL SERVICES AGENCY,**
Petitioner and Respondent,
vs.
**M.B.,**
Objector and Appellant.

**S260928**

(Court of Appeal No. A158143)

Alameda Superior Court No. JD-028398-02

# MINOR'S BRIEF ON THE MERITS

After the Unpublished Order by the First District Court of Appeal, Division One, Filed on January 21, 2020
Affirming an Order of the Superior Court of Alameda County
Superior Court, Honorable Charles Smiley, III

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# MINOR'S BRIEF ON THE MERITS

## INTRODUCTION

The welfare of California's children is the foundation on which the dependency scheme is built; protecting dependent children and providing them with a permanent, stable home is its goal. A stable and permanent home is one in which a child can feel safe, secure, and bonded to her caregivers. A search of the National Institute of Health website for the phrase "stability for children" reveals numerous studies describing the importance on a child's development of a stable early childhood.[1] It is thus no surprise that the Legislature requires expediency to ensure that the dependency system's goals are timely met.

[1] See <https://www.ncbi.nlm.nih.gov/pmc/>

A.R., the minor in this case, was born on July 26, 2016. Appellant is A.R.'s mother. A.R. was first removed from her mother's custody at 10 months old and spent the next three months in her prospective adoptive parents' care. A.R. returned to appellant under a plan of family maintenance, which was short-lived. Since January 2018, A.R. has only lived with her prospective adoptive parents.

Regarding the termination decision in this case, AR's counsel agreed with the Agency's recommendation to free A.R. for adoption. When the juvenile court selected adoption as A.R.'s permanent plan and terminated appellant's parental rights, A.R.'s counsel did not appeal. A.R. was then almost 3 years old.

Sixty-one days after the termination of parental rights, appellant was no longer A.R.'s legal parent, and A.R.'s adoption could be finalized because no party appealed the juvenile court's decision. Appellant, however, filed a late notice of appeal, which led to the current dispute. Minor contends that a parent in a situation like appellant's, cannot be granted relief from default from an untimely appeal following the termination of parental rights, whether under the constructive filing doctrine or any other procedure. Legal precedent, the uniqueness of the dependency system, fundamental fairness, and the rightful prioritization of a minor's interests in stability and permanency have to prevail.

In contrast, appellant suggests a wholesale transfer of the constructive filing doctrine from *In re Benoit* (1973) 10 Cal.3d 72, 81, which emerged from the line of prison-delivery rule cases. If this Court agrees and opens the door to remedy a late-filed notice

of appeal in dependency law based on ineffective assistance of counsel, the facts of this case preclude such application here. There is no evidence that appellant spoke directly to her appointed counsel about filing a timely notice of appeal, no evidence that her appointed counsel agreed to file an appeal notice on appellant's behalf, and no evidence that appellant reasonably relied on her counsel's agreement.

As of today, A.R. is four years old, has lived with her prospective adoptive parents for the past two and half years, and is still waiting for her adoption by them to be finalized. The just outcome here is to deny appellant relief and free A.R. to begin a permanent and stable family life.

## COMBINED STATEMENT OF CASE AND FACTS

With one exception, Minor adopts by reference appellant and respondent's statements of the case and facts set forth in their respective opening briefs under California Rules of Court, rule, 8.200(a)(5).

Minor adds the following:

Filed on November 1, 2019, the Agency informed the juvenile court in its post-termination status report there were "no known barriers" to finalization of A.R.'s adoption, and that adoption could occur once appellant's appeal, if denied, concluded. (2CTO 492-493.)

## ARGUMENT

### I. A Parent Does Not Have the Right to Challenge Her Counsel's Failure to File a Timely Notice of Appeal from an Order Terminating Parental Rights.

The requirement of a timely appeal notice is jurisdictional. The dependency scheme is unique with its focus on protecting the welfare of children. Finality is a critical component that advances the public policy of supporting a child's need for permanence and stability. Following a final judgment terminating parental rights, the minor's due process rights to stability and permanency prevail. For these reasons, no court has permitted a parent to challenge a late-filed notice of appeal following the termination of parental rights based on their trial counsel's negligence. The question presented here is whether a parent can override jurisdictional requirements and undo legal precedent to permit a claim of ineffective assistance of counsel for the failure to timely file a notice of appeal from the termination of parental rights. (Welf. & Inst. Code, § 366.26.)[2] For the welfare of all dependent minors like A.R., the answer must be no.

[2] Unspecified statutory references are to the Welfare and Institutions Code.

### A. Compliance with the Jurisdictional Requirement for a Timely Notice of Appeal Is Mandatory.

A timely notice of appeal is a mandatory pre-requisite to the transfer of jurisdiction from the superior court to the appellate court. (See *Estate of Hanley* (1943) 23 Cal.2d 120, 123; see also *People v. Slobodian* (1947) 39 Cal.2d 362, 365-366 [absent a timely notice of appeal, "appellate courts are without jurisdiction to consider an appeal"]; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864.)

"In strictly adhering to the statutory time for filing a notice of appeal, the courts are not arbitrarily penalizing procedural missteps." (*Estate of Hanley*, *supra*, 23 Cal.2d at p. 123.) But "[t]he first step, taking of the appeal, is not merely a procedural one; it vests jurisdiction in the appellate court and terminates the jurisdiction of the lower court." (*Ibid.*) The consequences of an untimely appeal notice are not remediable. (See *In re Fredrick E. H.* (1985) 169 Cal.App.3d 344, 346-347; see also *Imuta v. Nakano* (1991) 233 Cal.App.3d 1570, 1579, fn. 11 ["[c]ompliance with the time for filing a notice of appeal is mandatory and jurisdictional"].)

Prior to 1972, courts could grant relief from default from a late-filed notice of appeal with a showing of good cause. (*Benoit*, *supra*, 10 Cal.3d at p. 80.) Following amendments to the Rules of Court that extended the time to appeal from 10 days to 60 days, the Judicial Council simultaneously eliminated the ability of courts to grant relief from default. (*Ibid.*) This preclusion

remains. California Rules of Court, rule 8.60(d), provides, "[f]or good cause, a reviewing court may relieve a party from default for any failure to comply with these rules *except the failure to file a timely notice of appeal* . . . ." (Emphasis added.)

### B. A Claim of Ineffective Assistance of Counsel Cannot Undo A Final Non-modifiable Termination Order.

As far back as 1895, this Court has recognized that a parent has no ability to collaterally attack a final non-modifiable order in a child custody case. (See *Ex Parte Miller* (1895) 109 Cal. 643, 646-647.) The same limitation exists today and extends to the order terminating parental rights both by statute and precedent.

#### 1. The Legislature has expressly limited modification of a final termination order.

With exceptions inapplicable here, section 366.26, subdivision (i)(1), provides "[a]ny order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents . . . [a]fter making the order, the juvenile court shall have no power to set aside, change, or modify it . . . but nothing in this section shall be construed to limit the right to appeal the order."

Courts have interpreted this provision as a legislative mandate forbidding "alteration or revocation of an order

terminating parental rights except by means of a direct appeal from the order." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1161; see also *In re Jerred H.* (2004) 121 Cal.App.4th 793, 796 ["a juvenile court lacks jurisdiction to modify or revoke an order terminating parental rights once it has become final"].)

This Court has interpreted section 366.26, subdivision (i), as an expression of the Legislature "that the final order terminating parental rights and freeing the child for adoption itself cannot be collaterally attacked in the trial court." (*In re Zeth S.* (2003) 31 Cal.4th 396, 413.)

Any mechanism that gives a reviewing court the authority to grant relief from default, therefore, infringes upon the Legislative mandate of section 366.26, subdivision (i).

### 2. Habeas corpus cannot be used to collaterally attack an adoption-related action under *Alexander S.*

In 1988, this Court came closest to deciding the issue presented here: whether a writ of habeas corpus could be used to raise a claim of ineffective assistance of counsel following a final order in an adoption case. (See *Alexander S.*, *supra*, 44 Cal.3d at p. 868.) This Court held that for reasons of "sound public policy," habeas corpus could not be used to collaterally attack a final nonmodifiable adoption related action. (*Ibid.*)

*Alexander S.* concerned an independent adoption where the mother had timely appealed one judgment but failed to timely appeal the court's prior ruling denying her request to withdraw

consent for the adoption. (*Alexander S.*, supra, 44 Cal.3d at p. 859.) The appellate court, which was without jurisdiction to review the earlier proceeding, treated the mother's appeal as a writ of habeas corpus to reach the issues. (*Ibid.*) This Court reversed holding that "[o]ut of concern for the welfare of children in adoption actions . . . habeas corpus may not be used to collaterally attack a final nonmodifiable judgment in an adoption-related action where the trial court had jurisdiction to render the final judgment." (*Id.* at pp. 867-868.)

This Court rested its decision on the "sound public policy" that "[p]rotracted litigation over the custody of a child may harm the child . . . [f]or this reason, among others, the United States Supreme Court held that federal habeas corpus could not be used to litigate constitutional claims in child custody matters, observing that '[t]he State's interest in finality is unusually strong in child-custody disputes. The grant of federal habeas would prolong uncertainty for children . . ..' " (*Alexander S.*, *supra*, 44 Cal.3d at p. 868, citing *Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, 513-514.)

It seems beyond reasonable dispute that the order terminating parental rights and freeing a minor for adoption, as here, concerns an "adoption related" matter. Indeed, courts are in accord on this point. (See *Meranda P.*, *supra*, 56 Cal.App.4th at p. 1161 [a termination order is "adoption-related"]; *In re Darlice C.* (2003) 105 Cal.App.4th 459, 465-466.)

Accordingly, an ability to claim ineffective assistance of counsel to remedy a late-filed notice of appeal will have to

address the Legislative restriction on upsetting a final termination order and the preclusion of habeas relief in an adoption-related matter.

### 3. An adoption petition can be granted once a termination order is final.

The "sole purpose" of a section 366.26 termination hearing is to "select and implement" the best permanent plan for the minor. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 304.) Once adoption is selected, the court is under a duty to expedite its implementation for the sake of the minor. (*In re Celine R.* (2003) 31 Cal.4th 45, 59.) This Court must consider the potential impact of a finalized adoption on the issues at bar.

An adoption is only stayed following the termination of parental rights if a timely notice of appeal is filed. (§ 366.26, subd. (i).) The law permits the finalization of an adoption once a parent's appellate rights have been exhausted. (§ 366.26, subd. (b)(1) & (e)(1).) When no notice of appeal is filed within the 60-day window, an adoption can be finalized on day 61.

The adoption process is designed to be "binding" on the relevant parties and a court "has not power to set aside, change, or modify it" except in exceptional circumstances. (Cal. Rules of Court, rule 5.725(e).)

Minors are protected from a failed adoption after a final termination order by a savings clause under section 366.26, subdivision (i)(3). This provision allows a minor who has not been

adopted after three years from the termination of parental rights to petition the juvenile court to reinstate those rights. (§ 366.26, subd. (i)(3).) In certain circumstances, a petition can be filed within the three years. (§ 366.26, subd. (i)(3), (j).)

Once parental rights are terminated, prospective adoptive parents also gain statutory and natural rights that must not be ignored. (See e.g., § 366.26, subd. (k).) "When a child is adopted, the law creates a parent-child relationship between the adopting parent(s) and the child and severs the child's relationship with his or her natural family." (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1391-1392.)

In this case, the potential for a finalized adoption once appellant's appellate rights are exhausted is not just theoretical, but actual. In September 2018, A.R.'s prospective adoptive parents had completed a home study, entitling them to prioritization of their adoption application over any other applicants. (1CT 94; § 366.26, subd. (k).) By February 6, 2019, the Agency had completed all the necessary background checks for the prospective adoptive parents. (1CT 194.) In its November 1, 2019 post-termination status report, the Agency informed the juvenile court there were "no known barriers" to finalization of A.R.'s adoption, and that it could occur once appellant's appeal concluded. (2CTO 492-493.)

### C. Weighing of the Parties' Interests Precludes a Claim of Ineffective Assistance of Counsel from the Failure to Appeal a Final Non-modifiable Termination Order.

Jurisdictional issues aside, a consideration of the respective parties' interests in a termination proceeding weigh against permitting a claim of ineffective assistance of counsel based on the failure to file a notice of appeal.

The objective of the dependency scheme is to protect children. (*Marilyn H.*, *supra*, 5 Cal.4th at p. 307.) Any decision regarding an aspect of the dependency process requires consideration of the dependency system as a whole. (*Ibid.*) Although it has been said that the dependency system "may work a unique kind of deprivation" for parents (*In re Emily A.* (1992) 9 Cal.App.4th 1695, 1707), it is also a " 'remarkable system of checks and balances' designed to 'preserve the parent-child relationship and to reduce the risk of erroneous fact-finding in … many different ways ….' " (*Zeth S.*, *supra*, 31 Cal.4th at p. 410, internal citations omitted.) In analyzing a part of the dependency scheme, the interests of the parties' must be identified and balanced. (*Marilyn H.*, *supra*, 5 Cal.4th at p. 307.) The "dependency scheme, when viewed as a whole, provides the parent due process and fundamental fairness while also accommodating the child's right to stability and permanency." (*Ibid.*)

The same type of interest-balancing is necessary under due process to ascertain whether a proceeding is "fundamentally fair."

(See *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 26-27.) In *Lassiter*, the United States Supreme Court held that a parent who could not afford an attorney had the right to appointed counsel under the Due Process Clause of the Fourteenth Amendment. (*Id.* at p. 27.) The Court limited the right by explaining that such due process rights were subject to the balancing test established in *Mathews v. Eldridge* (1976) 424 U.S. 319, which weigh "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." (*Lassiter*, *supra*, 452 U.S. at p 27.) Given this principle, a parent's ability to raise a claim of ineffective assistance of counsel in a dependency proceeding must be analyzed with reference to the parties' interests and the risk of error.

### 1. Parents have a limited right to the effective assistance of counsel in dependency proceedings.

A parent has a statutory right to appointed counsel throughout the section 300 proceedings in dependency (§ 317, subd. (b)), and they may also have a due process right to counsel on a case-by-case basis when the termination of parental rights could result. (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 238.)

Section 317.5, subdivision (a), provides, "[a]ll parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel." *In re Kristin H.* (1996) 46 Cal.App.4th 1635 at pages 1661-1662, 1667, the court held that

this statutory right was not a "hollow" right and, based on the nature of the various interests involved including the minor's need for stability, a parent in a dependency proceeding could assert via a writ of habeas corpus that their trial attorney was ineffective during the initial jurisdiction and dispositional stage.

Under due process, the court in *Arturo A.*, *supra*, 8 Cal.App.4th at page 238, described a similar limitation on the right to claim ineffective assistance of counsel following the termination of parental rights. In *Arturo A.*, the mother timely appealed from the termination of her parental rights, but raised issues concerning the prior section 366.21 referral hearing. (*Ibid.*) Since such issues were properly reviewable only by writ, the mother claimed in the alternative that she had received ineffective assistance of counsel for her counsel's failure to file such a writ. (*Id.* at p. 237.) After the mother filed her opening brief, respondent moved to dismiss her appeal as nonappealable. (*Id.* at p. 235.) The court agreed and dismissed the appeal. (*Id.* at p. 246.)

In reaching its decision, the *Arturo A.* court recognized that "[i]n attempting to preserve the constitutional rights of a parent we cannot ignore the rights of the minor for whose benefit the statutory scheme has been enacted. We must undertake a balanced analysis of the parent's rights, recognizing that the interest sought to be protected by the dependency law is the welfare of the child." (*Arturo A.*, *supra*, 8 Cal.App.4th at p. 241.) With this balancing framework, the court recognized that the parent's rights at the pre-permanency stage were at their height

because "[t]he critical decision regarding parental rights" is made at the dispositional or review hearing since if reunification services are terminated, the later decision at the permanency hearing to terminate parental rights "will be relatively automatic." (*Id.* at p. 239.)

The *Arturo A.* court next considered the minor's interests, explaining, "[t]here can be no question that at some point the minor acquires a fundamental right which precludes further governmental involvement in the administration of the minor's dependency. Exactly when and in what circumstances the minor acquires a constitutional right to a settled life is an issue which we need not decide in this case. Nonetheless in our well-motivated efforts to protect the parent's constitutional right we cannot lose sight that the objective of effective and efficient judicial administration here is the rights of the child." (*Arturo A.*, *supra*, 8 Cal.App.4th at pp. 241-242.)

Although the court held that a parent has a right to challenge the ineffective representation of counsel under due process at the pre-permanency planning stage, the court required that any claim of ineffective assistance of counsel must be raised before the permanency hearing was held. (*Arturo A.*, *supra*, 8 Cal.App.4th at p. 241.) This "closed door" policy - wherein no late writs were permitted - was "essential to protect the rights of all interested parties." (*Ibid.*)

The import of *Kristin H.* and *Arturo A.* is that by statute and under due process, after weighing the parties' interests, and in light of public policy promoting a minor's welfare, parents'

have a limited right to raise a claim of the ineffective assistance of counsel concerning pre-termination proceedings. Neither *Kristin H.* nor *Arturo A.* provide an easy answer to the issues presented here, which concern a final judgment terminating parental rights. But the *Kristin H.* and *Arturo A.* courts indicated that there likely could be no such challenge.

In dicta, the *Kristin H.* court suggested that an ineffective assistance of counsel claim following the termination of parental rights might be precluded because "[i]n such cases the point may have been reached at which the interests of the child and parent collide, and at which the child's interest in finality prevails." *(Kristin H.*, *supra*, 46 Cal.App.4th at p. 1664.) The *Arturo A.*, court permitted a claim of ineffective assistance of counsel at the pre-permanency stage where the "critical decision regarding parental rights" is made, but otherwise mandated a closed-door policy on late appeals for the minor's sake. (*Arturo A.*, *supra*, 8 Cal.App.4th at p. 239.) The *Arturo A.* court thus imposed a "closed door" policy at a hearing where the strength of parents' rights were at their highest. Implicit in this observation is that if a "closed door" policy is "essential" when parents' rights prevail over a minors', it must be essential at the termination stage where the minors' interests prevail. (See Part I-D, *infra* [minors' interests prevail following a final order terminating parental rights].)

### 2. Parents' limited right to effective assistance of counsel does not extend past a final order terminating parental rights.

This case must decide the question *Kristin H.* and *Arturo A.* left open: whether a parent has the right to challenge the ineffectiveness of counsel past a final judgment terminating parental rights. In resolving this question, this Court, like the courts in *Kristin H.* and *Arturo A.*, must weigh the interests of the parties in the context of the dependency system as a whole.

### 3. The parents' interests.

Parents have a "liberty interest . . . in the care, custody, and management of their child" (*Santosky v. Kramer* (1982) 455 U.S. 745, 753; *Marilyn H.*, *supra*, 5 Cal.4th at p. 306.) The parent also has a "derivative" liberty interest in the "accuracy and justice of the resolution" of an appeal. (*Santosky*, *supra*, 455 U.S. at p. 753; *In re Sade C.* (1996) 13 Cal.4th 952, 987-988.)

Within the dependency system, parents are afforded a full range of protections designed to balance the various parties' interests. For example, a parent is statutorily guaranteed reunification services unless an exception applies because the prospect of reunification is too low to justify delaying the permanency and stability of the children. (§§ 361.5, subds. (a) & (b), 366.21, subds. (e) & (f).) Until the termination of reunification services, the parent's interest in having a child returned to them is the paramount concern of the law, and parents' benefit from the presumption of reunification. *(Cynthia D. v. Superior Court*

(1993) 5 Cal.4th 242, 255-256.)

In *Zeth S.*, *supra*, 31 Cal.4th at pages 410 to 411, this Court noted there are "precise and demanding substantive and procedural requirements which the petitioning agency must fulfill before it can propose termination." At the dispositional hearing, the agency must show by clear and convincing evidence that removal of the child is necessary. (§ 361, subd. (b).) At the interim review hearings, the agency must show by a preponderance of evidence that the return of the child would be detrimental to the child and that reasonable services have been provided. (§§ 366.21, subds. (e) & (f), 366.22, subd. (a).) To justify terminating reunification services, the agency must establish by a preponderance of evidence that it would be detrimental to return the child to the parent. (§§366.21, subd. (f), 366.22, subd. (a).) The agency's burden of proof at the termination of parental rights hearing is high; it must demonstrate by clear and convincing evidence that the child is likely to be adopted. (§ 366.26, subd. (c)(1).)

In addition to these safeguards, "independent judicial review of the case is mandated at least every six months during the reunification period and a myriad of positive findings are required with respect to every critical pre-permanency planning decision." (*Zeth S.*, *supra*, 31 Cal.4th at pp. 410-41.)

Finally, following the termination of parental rights, a parent has the right to appeal within 60 days of the termination order. (§ 395; Cal. Rules of Court, rules 5.585(b), 5.590, 5.661(b), 8.406(a).)

In sum, parents' rights and interests are protected up to and including their right to appeal within 60 days following the termination of parental rights.

**4. The minors' interests.**

Like parents, children have fundamental rights -- including the right to be protected from neglect and to "have a placement that is stable [and] permanent." (*Marilyn H.*, *supra*, 5 Cal.4th at p. 306; see also *Cynthia D.*, *supra*, 5 Cal.4th at p. 253; 919.) "Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) Indeed, minors have the "constitutional right to a settled life." (*Arturo A.*, *supra*, 8 Cal.App.4th at p. 241.)

A minor has a "liberty interest" in a "stable" and "normal family home," which has been called an "important" and "compelling" right. (*Santosky*, *supra*, 455 U.S. at p. 754, fn. 7; *Marilyn H.*, *supra*, 5 Cal.4th at p. 306). A minor also has a "derivative liberty interest" in an "accurate and just resolution" of her parent's appeal. (*Santosky*, *supra*, 455 U.S. at p. 754, fn. 7; *Marilyn H.*, *supra*, 5 Cal.4th at p. 306).

In considering the minor's interests in relation to a parent's, it is important to acknowledge that the minor's and parents' interests are presumptively "*inconsistent*." (*Sade C.*, *supra*, 13 Cal.4th at p. 989, emphasis in original.) "What the parent wants or needs is not necessarily what the child wants or needs." (See *Santosky*, *supra*, 455 U.S. at p. 788, fn. 13 (dis. opn.

of Rehnquist, J.).) "If consistent, any added protection arguably given to the parent might benefit the child as well. If inconsistent, however, such protection might effectively cause the child harm by helping the parent." (*Sade C.*, *supra*, 13 Cal.4th at p. 989.)

The importance of the minors' interests is well established. "It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or [other caretakers]. 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,' . . . especially when such uncertainty is prolonged." (*Lehman*, *supra*, 458 U.S. at pp. 513-514.) While a matter of months "may not seem a long period of time to an adult, it can be a lifetime to a young child. Childhood does not wait for the parent to become adequate." (*Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

Justice Brauer aptly summarized why a "child's welfare is at the top of the hierarchy of values":

> The child's interests take precedence over the rights, needs and wishes of biological parents. The state should not lightly intrude into the relationship between parent and child. But once neglect, abandonment or abuse has dictated removal, the separation of a child from a parent has devastating emotional consequences so as to make imperative an early new bonding with a person or persons who fulfill a child's psychological needs for stability, interaction, companionship, interplay and mutuality.

(*In re Micah S.* (1988) 198 Cal.App.3d 557, 566 (conc. opn. of Brauer, J.).) Accordingly, "[i]n placing the child's welfare at the top of the hierarchy of values and in recognizing the danger of

procrastination, the Legislature is on firm ground." (*Ibid.*)

Contrary to the parents', who gain the benefit of the presumptions pre-permanency planning, once reunification services are terminated, the minor's interest is prioritized. "By the time of a section 366.26 hearing, the parent's interest in reunification is no longer an issue and the child's interest in a stable and permanent placement is paramount." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) "In light of the earlier judicial determinations that reunification cannot be effectuated, it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home." (*Cynthia D.*, *supra*, 5 Cal.4th at p. 256.) The child has a compelling right "to [have] a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child." (*Marilyn H.*, *supra*, 5 Cal.4th at p. 306.) "Adoption is the Legislature's first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker." (*Celine R.*, *supra*, 31 Cal.4th at p. 53, citing *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.)

Lastly, once the termination of parental rights becomes final, the legal relationship between the minor and her natural parent changes. At the point of finality, the natural parent is no longer the minor's legal parent. (§ 366.26, subds. (b)(1), (e)(1), (i)(1).] In light of this, any weight attributed to the natural parent's rights must yield.

In sum, at the termination of parental rights stage public policy requires prioritization of a minor's need for stability and

permanence to support their welfare and development. Moreover, once finality occurs, a minor's fundamental due process right to a "settled life" in a "stable home" takes precedence over the natural parents' rights.

**5. The state's interests.**

The state has a "*parens patriae* interest in preserving and promoting the welfare of the child" that is "urgent" and "compelling." (*Santosky*, *supra*, 455 U.S. at p. 766; accord, *Lassiter*, *supra*, 452 U.S. at p. 27; *Marilyn H.*, *supra*, 5 Cal.4th at p. 307). Indeed, the state is duty-bound to protect a child's welfare. (*Ibid.*)

The state also has an "important" and "compelling" interest in an accurate and just resolution of the parent's appeal. (See *Santosky*, *supra*, 455 U.S. at p. 766; *Marilyn H.*, *supra*, 5 Cal.4th at p. 306). Serving the state's interest in finality, there is an overriding presumption that any "appealed-from decision, which is predicated on detriment the parent caused or allowed his child to suffer, is presumptively accurate and just." (See *Sade C.*, *supra*, 13 Cal.4th at p. 989.) To a lesser extent, the state has a "fiscal and administrative interest in reducing the cost and burden of [the] proceedings." (*Santosky*, *supra*, 455 U.S. at p. 766.)

Finally, the state has a significant interest in expediency. Proceedings such as termination proceedings "must be concluded as rapidly as is consistent with fairness . . .." (*Sade C.*, *supra* 13 Cal.4th at pp. 987-990.)

On balance, at the termination stage of a dependency proceedings, the state's interest in protecting the welfare of minors, which includes the finality and expediency interests, must outweigh its lesser interests concerning the parent's appeal.

**6. The low risk of an erroneous decision.**

The final balancing factor concerns the "risk of error" created by, in this case, precluding relief from default. (*Cynthia D.*, *supra*, 5 Cal.4th at p. 260.)

As noted above, parents' have a plethora of protections throughout the dependency process designed to assure them due process and reduce the risk of an erroneous deprivation. (See Part I-C-3.) Prior to the section 366.26 hearing, the parents' benefit from the presumption of reunification. (*Cynthia D.*, *supra*, 5 Cal.4th at pp. 255-256.) Even when termination is recommended, the agency is required to show by clear and convincing evidence that adoption is likely; a burden that is designed in part to reduce the risk of error. (See *Santosky*, *supra*, 455 U.S. at pp. 768-769.)

Accordingly. by the time the proceedings reach the permanency stage, "[t]he 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.*, *supra*, 5 Cal.4th at pp. 255-256.) Under the dependency scheme, the risk of an erroneous termination decision is low. (See *Lassiter*, *supra*, 452 U.S. at p 27.)

### D. The Minor's Interests Prevail Following a Final Judgment Terminating Parental Rights.

A parents' rights are adequately protected up to and including their right to appeal a termination order within 60 days. Once there is a final order terminating a natural parent's rights, the minor's rights to a permanent and stable home attains its rightful place at the top of the interest hierarchy. Sound public policy and the minor's rights to due process compel this conclusion. The potential damage to a child's development by prolonged uncertainty requires prioritization of their interests following a final judgment terminating parental rights.

Appellant believes that, "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." (AOB 54-55.) From Minor's perspective, appellant is wrong.

Parents have the right to appeal a termination order and the right to access that appeal by filing a notice of appeal within 60 days of the judgment. (See AOB 29; § 395; Cal. Rules of Court, rules 5.585(b), 5.590, 5.661(b), 8.406(a).) The parties share an interest in the accuracy of the judgment, but the accuracy interest is a derivative interest. (*Santosky*, *supra*, 455 U.S. at p. 753; *Sade C.*, *supra*, 13 Cal.4th at pp. 987-988.) Following a final termination order when no party appeals, any remaining interest in the judgment's accuracy must be relegated. Since the competing interests are the minor's fundamental rights and the

state's interests in protecting children, finality and expediency, the only logical conclusion is that the minor's interests in a final judgment must prevail. In the dependency context, the concept of "finality" is inextricably linked to a minor's right to a "settled life" since finality of the termination order contemporaneously allows for a permanent and stable home to begin. (*Arturo A.*, *supra*, 8 Cal.App.4th at p. 241; § 366.26, subd. (b)(1) & (e)(1).)

In this case, appellant's and A.R.'s interests are not only presumptively inconsistent (See *Sade C.*, *supra*, 13 Cal.4th at p. 989), they are *actually* inconsistent. Thus, rather than harming A.R. by elevating finality above accuracy, A.R.'s interests are *advanced* because it would allow her long-sought adoption to proceed without delay.

Appellant's concerns over the accuracy and justness of the termination order must be viewed in light of the fact that appellant is the only party who sought to appeal the judgment. By seeking to appeal, appellant asserted her belief there might have been legal errors at the hearing. The fact that no one else sought to appeal, shows that no other party observed any irregularities that made them believe appellate review was warranted.

Appellant had 60 days to file a notice of appeal, which she failed to do. In contrast, A.R. agreed with the Department's recommendation to terminate appellant's parental rights. (6/12/19 RT 6-7.) Once the juvenile court terminated appellant's parental rights, A.R. did not appeal that judgment indicating her belief that the decision was just. Consequently, A.R.'s sole

interest at this juncture is in finality of the termination order so that she can be adopted by her prospective adoptive parents as soon as possible.

For reasons of sound public policy and a minor's paramount due process rights, appellant's request for relief must be denied. A parent cannot seek appellate jurisdiction by blaming the failure of trial counsel to file a timely notice of appeal under the circumstances of this case. By the time appellant's 60-day window to perfect her right to appeal expired, A.R.'s interests in finality, permanence, stability, and the "right to a settled life" must succeed. (See *Arturo A.*, *supra*, 8 Cal.App.4th at p. 241.)

Appellant, with undue alarm, suggests that the legitimacy of the dependency scheme is at stake. (AOB 59.) But while appellant characterizes the issue of fairness as one focused solely on the parent, she fails to recognize that permitting a late appeal will cause someone else to suffer. That person is A.R.

### E. The Record Shows A.R.'s Prevailing Interest in a Permanent Home with Her Prospective Adoptive Parents.

A.R. was born on July 26, 2016, and has lived with her prospective adoptive parents for over half her four-year old life. In many respects, A.R. is a prime example of why stability and permanency are so crucial for California's young ones.

The record shows that following A.R.'s visits with appellant, she was often "hyper, hard to soothe, very whiny and clingy." (1CT 188.) A.R.'s therapy centered on building secure

attachments to counteract the effects of the various transitions she was experiencing. (2CT 404.) The dyadic therapy between appellant and A.R., when it occurred, was similarly focused on ensuring A.R. felt safe and secure. (1CT 114.) A.R. also suffered from developmental delays involving her speech and fine motor skills. (1CT 282; 2CT 326.) At school, A.R. was often alone, which her caregiver attributed as an extension of attachment issues. (2CT 325.) Evidencing A.R.'s desire for consistency and need for attachment, she would follow her prospective adoptive parent from room to room. (2CT 325.)

By January 2019, A.R.'s dyadic therapy with appellant had ceased, but A.R. continued to see a therapist for herself. (2CT 326.) The therapist reported that A.R. was "responding well to therapy focusing on her sense of attachment and security." (2CT 326.) Unfortunately, following some of her visits with appellant, A.R. would be "dysregulated" and uncharacteristically aggressive with her caregivers, both in words and actions. (2CT 404.) This behavior would sometimes take days to resolve. (2CT 404.) The record shows that the environment where appellant and A.R. visited was chaotic and the house was home to multiple other adults. (2CT 327.)

The visits, and A.R.'s difficulties afterwards, also coincided with the unpredictable nature of appellant's availability. Appellant would cut some visits short or cancel the visit entirely when A.R. was in the process of being driven to see her. (2CT 404.) Such a circumstance was not unusual, but commonplace. (2CT 404.) Ultimately, A.R.'s visitation was reduced from every

weekend to every other weekend plus one additional day per month. (2/6/19 RT 7; 1CT 114; 2CT 330.) This new arrangement continued to be in A.R.'s best interests throughout the remaining dependency proceedings.

A.R. epitomizes the negative impact of uncertainty and instability for a young child. A.R. was slow to develop in key areas, required focused therapy to build her sense of safety, security, and attachment, and exemplified through her shouting and physical aggressiveness, her feelings about her situation.

There is an understandable emotional toil a parent must feel if their inability to appeal a decision is solely due to their counsel's negligence. But someone has to live with these consequences. The difficult question is which party should bear that burden. In light of a minor's prevailing due process rights and public policy, it must be the parent. Now that day 61 post-termination has passed, A.R. is entitled to a "stable" home and the finalization of her adoption.

### F. Conclusion.

This Court must hold that when day 61 arrives post-termination without a timely notice of appeal, and no matter the circumstances, the point has "been reached at which the interests of the child and parent collide, and at which the child's interest in finality prevails." (*Kristin H.*, *supra*, 46 Cal.App.4th at p. 1664.) Given this, a final order terminating parental rights cannot be collaterally attacked even for ineffective assistance of counsel for the failure to file a timely notice of appeal.

## II. Any Mechanism for Relief from Default Following The Termination of Parental Rights Requires a Heightened Showing of Detrimental Reliance, Diligence, and Prejudice.

As Minor explained in Part I, sound public policy, due process, and statutory law preclude a parent from relying on a claim of ineffective assistance of counsel regarding a late-filed notice of appeal. Although Minor takes no position on the proper mechanism should such a claim be permitted, she urges this Court to consider the following points.

### A. The Constructive Filing Doctrine Has No Application in Dependency Proceedings.

Despite the strong legal foundation requiring the timely filing of a notice of appeal, courts have fashioned a limited mechanism to permit a notice of appeal by constructive filing even if the 60-day filing window had passed. (See *Slobodian*, *supra*, 39 Cal.2d at pp. 365-366; *Benoit*, *supra*, 10 Cal.3d at p. 81) This type of constructive filing has been limited to incarcerated criminal defendants, incarcerated civil litigants, and litigants who were lulled into a false sense of security by the courts on the issue of jurisdiction. There has been no extension of the doctrine to dependency proceedings.

By tracing the development of constructive filing from criminal law to civil law, it becomes clear that the public policy of permanence and stability for dependent minors is the reason such relief has been denied from a final order terminating parental rights.

### 1. *Slobodian* prison delivery rule.

First articulated by this Court in *Slobodian*, *supra*, 30 Cal.2d at page 365, the prison delivery rule allows for an incarcerated defendant's notice of appeal to be "constructively filed" on the date the notice was given to prison authorities. (See *In re Gonsalves* (1957) 48 Cal.2d 638, 646; *People v. Dailey* (1959) 175 Cal.App.2d 101, 107; *In re Jordan* (1992) 4 Cal.4th 116, 130.) The *Slobodian* rule also applies where an incarcerated defendant justifiably relied on prison officials regarding the timely filing of a notice of appeal. (See *People v. Calloway* (1954) 127 Cal.App.2d 504, 507; *People v. Head* (1956) 46 Cal.2d 886, 889.)

*Benoit*, *supra*, 20 Cal.3d at page 86, expanded the prison delivery rule to defendants who were "incarcerated or otherwise in custody," but who had relied upon their trial attorney, rather than a prison official, to timely file a notice of appeal. This Court explained, "we can well understand the inclination of a defendant . . . under sentence and facing the restraint of jail or prison, to rely on his trial counsel for assistance. And we can also understand how in such circumstances 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 pp. 86-87.)

Finally, in 2009, this Court used the principles of the prison delivery rule to constructively file a civil litigant's notice of appeal. (See *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 119-123.) In *Silverbrand*, the self-represented and incarcerated litigant filed a medical malpractice suit against a

hospital, the prison authorities, and several prison medical providers. (*Id.* at p. 111.) The hospital defendant's motion for summary judgment was granted, and so the incarcerated plaintiff mailed a notice of appeal from the prison within the requisite time to appeal. (*Ibid.*) The court clerk received the notice two days after the filing deadline. (*Ibid.*) Based on the same principles enunciated in *Slobodian* and its progeny, this Court found no reasonable basis to preclude constructively filing the incarcerated plaintiff's notice of appeal simply because the type of appeal was civil in nature. (*Id.* at p. 121.)

A number of basic principles emerge from this line of prison-delivery constructive filing cases. The first is that the constructive filing doctrine achieves the goal of equal access to the courts. An incarcerated litigant is physically unable to travel to a courthouse, or use the mail without a required prison administrative intermediary, and cannot easily access telephone services to check on the status of an appeal. (See e.g., *Slobodian*, *supra*, 30 Cal.2d at p. 366; *Jordan*, *supra*, 4 Cal.4th at p. 130.)

The doctrine also recognizes the unique position that an incarcerated defendant faces by reason of their imprisonment. Prisoners are "wholly dependent" on the actions of others to ensure that a notice of appeal is filed; justifiable reliance on prison authorities is a pre-requisite to the filing of a notice of appeal at all. (*Slobodian*, *supra*, 30 Cal.2d at p. 366; *Jordan*, *supra*, 4 Cal.4th at p. 124.)

### 2. Constructive filing beyond the incarcerated.

For a non-incarcerated litigant, the constructive filing doctrine has been extended to cover only one additional scenario: where a litigant detrimentally relied upon the trial court's erroneous assertion of jurisdiction. (See *People v. Martin* (1963) 60 Cal.2d 615, 616-619.)

In *Martin*, *supra*, 60 Cal.2d at page 616, the trial court had entertained a motion for new trial after the defendant's judgment had become final despite having no jurisdiction to hear the motion. (*Ibid*.) At the conclusion of the hearing, the defendant, appearing pro per and by then in custody, handed the court clerk a notice of appeal. (*Id*. at p. 616.) The clerk filed the notice of appeal even though the filing deadline from the original judgment had passed. (*Ibid*.) The People moved to dismiss the defendant's untimely appeal. (*Ibid*.) The appellate court denied the motion to dismiss finding that the trial court had "lulled" the defendant into a "false sense of security" regarding the timing of the appeal notice. (*Id*. at p. 619.)

The other case to expand the constructive filing doctrine to a non-incarcerated defendant was *People v. Snyder* (1990) 218 Cal.App.3d 480 at pages 492-493, overruled on other grounds by *People v. DeLouize* (2004) 32 Cal.4th 1223 at page 1233. In Snyder, the defendant brought a new trial motion after his jury trial convictions, but for which the People failed to file a written opposition. (*Id*. at p. 489.) The trial court granted the new motion finding that the People's failure to submit any opposition

constituted a concession. (*Ibid*.) The People "promptly sought reconsideration," which the trial court entertained despite lacking jurisdiction. (*Ibid*.) At the "reconsideration" hearing, the trial court reversed its earlier ruling and denied the defendant's new trial motion. (*Ibid*).

The defendant appealed on grounds including that the trial court's lack of jurisdiction precluded the People's reconsideration motion. (*Snyder*, *supra*, 218 Cal.App.3d at pp. 489-490.) The court agreed, but found that the reason the People had failed to file a timely notice of appeal was because they were "lulled into a false sense of security by the court's improper assertion of jurisdiction." (*Id* at p. 492.) Based on the constructive filing doctrine, the appellate court allowed the People to file a notice of appeal from the order granting the new trial. (*Id*. at pp. 485, 495.)

For the non-incarcerated litigant, therefore, the only time the rule has been permitted outside of a prison setting is where the appellant was "lulled into a false sense of security" by the trial court after the trial court erred as to its own jurisdiction. (*Martin*, *supra*, 60 Cal.2d at p. 619; *Snyder*, *supra*, 218 Cal.App.3d at p, 492.)

### 3. Courts decline to permit constructive filing in dependency proceedings.

In *Alexander S.*, supra, 44 Cal.3d at pages 867-868, this Court precluded collateral attacks on a final adoption-related judgment explaining that, "protracted litigation over the custody

of a child may harm the child" and so "sound public policy" appropriately precludes revisiting a prior dependency judgment that has become final. (*Id*. at p. 868.) For these same policy reasons, no California decision has permitted the use of constructive filing to remedy a later notice of appeal from a final order terminating parental rights.

For example, the court in *In re A.M.* (1989) 216 Cal.App.3d 319 at page 322, was clear that the constructive filing doctrine had no application to an order terminating parental rights due to the "special need for finality" in such cases since uncertainty in the final judgment "jeopardized" adoption proceedings. (*Ibid*.)

Three years later, in *In re Isaac J.* (1992) 4 Cal.App.4th 525 at page 529, the father had previously had his direct appeal dismissed due to his own failure to timely file a notice of appeal and had then filed a writ of habeas corpus under the theory that he had received the ineffective assistance of appellate counsel for the failure bring a *Benoit* style motion for relief from default. (*Ibid*.) The court denied relief. (*Id*. at p. 532.) The *Isaac J.* court agreed with the general proposition that a claim of ineffective assistance of counsel was properly reviewable "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" (*Id*. at pp. 521-532.) The court also recognized that the criminal law constructive filing doctrine may have some validity in the dependency context when there was "justifiable reliance on the promise of counsel that a timely notice will be

filed." (*Id*. at p. 532.) But the court held that the constructive filing doctrine had no application to termination proceedings "for the reasons of policy discussed in [*A.M.*, *supra*,] 216 Cal.App.3d 319." (*Ibid*.) In the court's view, this was "the point at which the interests of the child and parent collide, and at which the child's interest in finality prevails." (*Ibid*.)

Finally, in *In re Alyssa H.* (1994) 22 Cal.App.4th 1249 at page 1254, the mother filed a notice of appeal four days late, and the court concluded that the notice was "void" because "the special need for finality in parental termination cases and the danger of imperiling adoption proceedings prevails over the policy considerations in favor of constructive filing." (See also *In re Ricky H.* (1992) 10 Cal.App.4th 552, 563, 559-560 [same]; *In re Ryan R.* (2004) 122 Cal.App.4th 595, 598 [same]; *In re Z.S.* (2015) 235 Cal.App.4th 754, 767-769 [same]; *In re J.A.* (2019) 43 Cal.App.5th 49, 56 [same].)

Appellant attempts to minimize the well-settled precedent of these cases by noting that they each concern the pre-1989 statutory scheme, which separated the section 300 dependency proceedings from the actions terminating parental rights occurring under Civil Code section 232. (AOB 46.) Appellant's dismissal of their holdings is unpersuasive because the changes were implemented to benefit the minors' need for permanence and stability by making the dependency scheme more efficient. (See *Cynthia D.*, *supra*, 5 Cal.4th at pages 247, 255-256). The public policy interests in achieving permanence and stability for minors were thus *strengthened* by the revisions.

Accordingly, any mechanism that permits constructive filing from a final judgment terminating parental rights must do so without violating the minor's due process rights, and while ensuring the "sound public policy" of a minor's need for stability and permanency is not contravened. (*Alexander S.*, *supra*, 44 Cal.3d at p. 868.)

#### 4. There are fundamental differences between criminal law and dependency law.

There are a number of differences between criminal law and dependency law that, when taken together, make a wholesale transfer of the constructive filing doctrine to a final judgment terminating parental rights problematic.

First is the issue of origin. The right to the effective assistance of counsel in dependency law is statutory and extends to a due process right only in certain situations. (§ 317.5; *Arturo A.*, *supra*, 8 Cal.App.4th at p. 238.) In contrast, the right to the effective assistance of counsel in criminal cases derives from the Sixth Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment. (*Powell v. Alabama* (1932) 287 U.S. 45, 53; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 345.)

There are other practical differences. For example, as respondent noted in its brief, a parent does not share the same difficulties in basic physical or telephonic access to the courthouse or their attorneys than an incarcerated defendant does. (See RB

29-30.) There is also the procedural difficulty in implementing a structure for determining the prejudice from a trial attorney's negligent late-filing of a notice of appeal. Unlike criminal law, which is entirely static and the prejudice from counsel's negligent late-filing is viewed solely at the time it occurred, the resolution of dependency cases require decisions based on "current facts." (*Arturo A.*, *supra*, 8 Cal.App.4th at pp. 229, 243-244; RB 50.)

In addition, there are procedural differences in the way that hearings are conducted and in the burden of persuasion required to make ultimate decisions. (See *In re James F.* (2008) 42 Cal.4th 901, 915 [unlike criminal law, a dependency ruling can rely on hearsay, the parent has no right to a jury trial, and the ultimate decision to terminate parental rights is supported by clear and convincing evidence rather than the higher beyond a reasonable doubt standard of criminal prosecutions].)

Critically, the dependency scheme is designed for the protection of minors. As this Court has said, "the ultimate consideration in a dependency proceeding is the welfare of the child," which is a "factor having no clear analogy in a criminal proceeding." (*James F.*, *supra*, 42 Cal.4th at p. 915.)

This Court described one aspect of this factor in *Celine R.*, *supra*, 31 Cal.4th at pages 58 to 59. "[I]n a criminal case, reversal of a criminal judgment is virtually always in the defendant's best interest. The situation in a dependency case is often different. Reversal of an order of adoption, for example, might be *contrary* to the child's best interest because it would delay and might even prevent the adoption." (*Id.* at p. 59, emphasis in original.)

Another aspect of this child welfare concerns the adversarial disparity. In a criminal trial, "the person facing sanctions is confronted by the state," but in contrast, "*every right afforded the parents, every reunification service ordered, every continuance, and especially every appeal taken is purchased at the expense of the person who is in law and morality the primary object of judicial solicitude, namely the child*." (*Micah S.*, *supra*, 198 Cal.App.3d at pp. 565-566, emphasis in original.)

The dissimilarities between criminal prosecutions and dependency proceedings are not just procedural, but fundamental and child-focused. Application of the constructive filing doctrine to a final order terminating parental rights must consider these differences.

### B. If This Court Holds That the Constructive Filing Doctrine Is Applicable in Dependency Law, Then There Must Be a Heightened Standard under *Benoit*.

If a constructive filing mechanism is permitted at the termination of parental rights stage, Minor joins with respondent in urging this Court to require a heightened showing under *Benoit*, *supra*, 10 Cal.3d at page 80. (See RB 39.) If the door must be partially opened to some parents, let it only be opened a fraction.

### 1. Application of the constructive filing doctrine in dependency law requires a heightened showing of justifiable reliance and due diligence.

In her opening brief, appellant relied on Justice Timlin's dissent in *Isaac J.*, *supra*, 4 Cal.App.4th at pages 536 to 543, which described a format for constructive filing under *Benoit*. (See AOB 47-49.) "Benoit suggests that a constructive filing of an appeal (based on ineffective assistance of counsel) should only be allowed when the request for permission to make such a filing shows (a) justifiable reliance by the appellant on counsel to file the notice of appeal, (b) due diligence by the appellant in assuring himself or herself that counsel was, in fact, proceeding to file the notice of appeal, and (c) the ineffective assistance of counsel in nevertheless failing to file the notice of appeal in a timely fashion." (*Id.* at p. 540.) Under this standard, however, appellant would not be entitled to relief.

First, a showing of "justifiable reliance" includes "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 (at least to the extent of filing a notice of appeal)." (*Isaac J.*, *supra*, 4 Cal.App.4th at p. 540.) Appellant cannot show justifiable reliance because the only evidence is that she "informed" her attorney of her desire to appeal and that her attorney "learned" of appellant's request, but this is not evidence of a direct communication between appellant and her attorney. (Declaration of M.B., at

paras. 1-3, 7; Declaration of Rodriguez, at para. 4.) Accordingly, there is no evidence of an agreement as to whether a notice of appeal would be filed or who would do the filing.

Second, appellant could not show "due diligence." (See *Isaac J.*, *supra*, 4 Cal.App.4th at p. 540.) A parent who "merely told their counsel to file an appeal and forg[o]t about it" does not show "due diligence." (*Id*. at p. 241.) By her own declaration, appellant did exactly that. The only information about any communication between appellant and her attorney is that appellant "informed" her attorney about wanting to appeal. (Decl. M.B. At para. 7.) Appellant then seemingly forgot about the notice of appeal issue because there is no evidence she ever followed up to ensure the filing was done. Through her own inaction, appellant is just as much to blame for the failure to file as her attorney. (See also *Ricky H.*, *supra*, 10 Cal.App.4th at pp. 559-560 [appellant's inaction precluded constructive filing relief].) Appellant should be denied relief under a *Benoit*-style analysis.

### 2. Application of the constructive filing doctrine in dependency law requires a heightened showing of prejudice.

In the criminal context, an attorney's failure to file a timely notice of appeal on request demonstrates a dereliction of duty and could support an ineffective assistance of counsel claim. (see *Benoit*, *supra*, 10 Cal.3d at pp. 86-89; *People v. Diehl* (1964) 62 Cal.2d 114, 117-118.) But it does not automatically follow that relief be granted even in criminal cases.

In *Roe v. Flores-Ortega* (2000) 528 U.S. 470 at pages 484-485, the United States Supreme Court considered which standards should determine a claim of ineffective assistance of counsel when the defendant's trial attorney failed to timely file a notice of appeal. The Court held first that, "counsel has a constitutionally-imposed duty to consult with the defendant about an appeal" if either "a rational defendant would want to appeal" or that the defendant "reasonably demonstrated" an interest in appealing. (*Id*. at p. 480.) Failure to do so contravened the first negligence prong from *Strickland v. Washington* (1984) 466 U.S. 668 at page 688.

As is pertinent here, the Court next turned to the issue of prejudice holding that a defendant makes out a successful ineffective assistance of counsel claim entitling him to an appeal by showing "counsel's constitutionally deficient performance deprive[d]" the defendant of an appeal that they "otherwise would have taken . . . ." (*Flores-Ortega*, *supra*, 528 U.S. at p. 484.) Any ineffective assistance of counsel claim to remedy a late-filed notice of appeal following the termination of parental rights requires a more robust showing of prejudice due to the fundamental differences between criminal law and dependency law. (See Part I-B-4, *infra*.)

At a minimum, for a parent to show prejudice -- that it is "reasonably probable that a determination more favorable to [appellant]" would result (*Adoption of Michael D.* (1989) 209 Cal.App.3d 122, 136; see also *People v. Watson* (1956) 46 Cal.2d 818, 836) -- the parent must make a colorable claim that they

would succeed on the merits of their challenge to the termination of parental rights judgment. (See *Arturo A.*, *supra*, 8 Cal.App.4th at p. 243.) Moreover, the parent must "demonstrate the likelihood of a different result based on current facts," which would likely entail a remand back to the juvenile court for purposes of an evidentiary hearing. (*Id*. at pp. 244-246.)

Appellant filed an opening brief in her direct appeal contemporaneously with her motion for relief from default. For the reasons outlined by respondent (see RB 43-50), appellant could not make such a colorable claim here.

## III. Minor Joins In Respondent County Counsel's Arguments.

Like Minor, respondent argues that there should be no relief from default following the termination of parental rights. For the reasons outlined above in Part I, Minor agrees and joins in respondent's arguments. Minor's interests would be advanced if appellant's requested relief was denied. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364; *People v. Nilsson* (2015) 242 Cal.App.4th 1, 12, fn. 2.) Minor's interest in a permanent and stable home with her prospective adoptive parents will be realized should appellant's appeal be dismissed.

Respondent also reaches the merits of appellant's direct appeal challenge to the termination of parental rights. (RB 43-50.) Minor also joins in respondent's arguments since the affirmance of the judgment terminating appellant's parental rights will give A.R. the permanent and stable home that she desires.

## CONCLUSION

The legitimacy of the dependency system is not risked by a closed-door policy to late-filed notices of appeal from day 61 on the facts of this case. Only appellant's interests could conceivably be advanced by a redefinition of the jurisdictional line. The Legislature and the dependency scheme dictate that the person whose interests must prevail in such a situation is A.R.'s. Appellant's interests were protected and promoted throughout the dependency process up until her time to appeal expired. It is time to close the door and allow AR's adoption to be finalized and to give her a future without further uncertainty.

Dated: September 3rd, 2020

Respectfully submitted

/s/ *Anna L. Stuart*

Anna L. Stuart
Attorneys for Overview
Party, A.R.

## CERTIFICATE OF WORD COUNT

I hereby certify that according to the word count function on the software utilized by my computer, ***MINOR'S BRIEF ON THE MERITS*** contains 9950 words.

Dated: September 3rd, 2020

/s/ *Anna L. Stuart*
Anna L. Stuart
Attorneys for Overview Party, A.R.

**DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL**

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

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the within ***MINOR'S BRIEF ON THE MERITS*** to the following parties hereinafter named by:

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X **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

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For Delivery to the Hon. Charles Smiley
2500 Fairmont Drive
San Leandro, CA 94578

I declare under penalty of perjury the foregoing is true and correct. Executed this 3rd day of September, 2020, at San Jose, California.

/s/ *Priscilla A. O'Harra*
Priscilla A. O'Harra

**STATE OF CALIFORNIA**
Supreme Court of California

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Supreme Court of California

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Date

/s/Priscilla O'Harra

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Stuart, Anna (305007)

Last Name, First Name (PNum)

Sixth District Appellate Program

Law Firm