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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

S260928

ALAMEDA COUNTY SOCIAL SERVICES AGENCY,

Plaintiff and Respondent,

v.

M.B.,

Objector and Appellant.

Court of Appeal Case No. A158143

(Alameda County Superior Court No. JD-028398-02)

APPELLANT'S REPLY BRIEF ON THE MERITS

After the Unpublished Order by the Court of Appeal
First District, Division One
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

The statutory scheme in the juvenile dependency system affords indigent parents the right to state-funded, court-appointed counsel when out-of-home placement is at issue. This right to legal representation begins at the initial detention hearing and continues through the permanency planning hearing. Counsel's duties throughout this process include the filing of a notice of appeal when requested by their client. Even after parental rights have been terminated, counsel is not to be relieved of the responsibilities owed the client until the period to file a notice of appeal has passed.

Although respondent has acknowledged a parent's statutory right to competent counsel, the fundamental liberty interests at stake at the section 366.26 hearing, and a parent's right to appeal, respondent argues that a parent should be deprived of a right to appeal even when, through no fault of their own, court-appointed counsel fails to timely file a notice of appeal as requested.

To reach this conclusion, respondent 1) labels mother's request for constructive filing of her notice of appeal a collateral attack on the judgment, 2) describes mother's notice of appeal as a "belated appeal," and 3) suggests applying the constructive filing doctrine would inevitably result in a "years long" delay of permanency for the child. Neither relevant law nor the facts of this case supports any of these assertions.

The constructive filing doctrine is not a vehicle for launching a collateral attack on a final judgment. To the contrary, the doctrine merely recognizes that certain efforts to perfect an appeal taken within the window authorized by the rules of court may be deemed to constitute a timely filing even when the physical filing of the notice of appeal occurs outside that window. For the same reason, mother, who asked trial counsel to file a timely notice of appeal for her 55 days *before* the expiration of the 60-day deadline, is not seeking permission to file a belated notice of appeal. Granting her and other similarly situated parents relief under the constructive filing doctrine would not work a years long delay of permanency for the child.

Adopting respondent's approach would perpetuate a system where parents in dependency proceedings, who are often without resources, are denied full participation in a legal system that fails to fulfill its promise of providing competent representation and the prospect of relief on appeal.

Mother submits that a parent in a juvenile dependency proceeding should have the right to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights under Welfare and Institutions Code[1] section 366.26. Adopting the approach outlined by this Court in *In re Benoit* (1973) 10 Cal.3d 72, a parent would be required to show by noticed motion that they were diligent in requesting that their attorney file a notice of appeal, they reasonably relied on their attorney to complete that task, and their attorney provided ineffective assistance of counsel in failing to timely file the notice of appeal.

Where severance of the parent-child relationship is at stake, reason, fairness, and justice require no less.

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

ARGUMENT

I. To Ensure Access To Justice, A Notice Of Appeal Should Be Considered Constructively Filed When A Parent In A Juvenile Dependency Proceeding Has Been Diligent In Requesting That Their Court-Appointed Counsel File A Notice of Appeal, The Parent Has Reasonably Relied On Their Counsel To File the Notice, and Their Counsel Fails To Do So.

A. Introduction

Respondent agrees that parents in juvenile dependency proceedings have a right to effective assistance of counsel. (RBM[2] 22.) Nevertheless, respondent implores this Court not to "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." (RBM 22.)

Respondent argues that 1) sound public policy and precedent hold that appellate courts have no jurisdiction to consider untimely appeals in juvenile dependency cases, 2) exceptions to the jurisdictional rule are rare and incompatible with juvenile dependency proceedings, and 3) the constructive filing doctrine is inapplicable to juvenile dependency proceedings due to differing policy considerations. (RBM 22-39.)

Respondent relies on several mischaracterizations to create a narrative of facts not supported by the record. For example, inexplicably and without basis, respondent questions the veracity

[2] Respondent's Brief On The Merits will be referred to as "RBM."

of mother and trial counsel's declarations, both of which were signed under the penalty of perjury.[3] These declarations explained that 1) mother told her trial counsel well within the statutory timeline that she wanted to appeal the juvenile court's decision terminating her parental rights and 2) that trial counsel failed to timely file the notice of appeal as requested by her client. (Declaration of Mother attached to Appellant's Application for Relief from Default Filed in the Court of Appeal on December 27, 2019; Declaration of Rita Rodriguez attached to Appellant's Application for Relief from Default filed in the Court of Appeal on December 27, 2019.)

Respondent argues against allowing an "untimely appeal to go forward after a dependent minor has been in a safe, permanent, and stable home for years." (RBM 22.) However, the length of these dependency proceedings, which included a period of time where the child was returned to mother with family maintenance services and mother received family reunification services, is not a factor in assessing the events that occurred during the sixty-day time period for filing a notice of appeal. (Aug CT 118-119, 1CT 81-82.)

Further, respondent presents policy considerations involving the child, the state, and the parent as a binary choice between a child's need for finality and a parent's access to justice. However, the state, the minor, and the parents all share an

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[3] When discussing these declarations, respondent states "if [the] declarations are to be believed" yet does not provide a basis to suggest the declarations should not be believed. (RBM 21, 43.)

interest in ensuring the accuracy of findings and orders made in juvenile dependency proceedings, especially those involving the destruction of the parent-child relationship. Respondent is unable to contemplate a situation where the minor's need for finality is protected while ensuring that a parent's right to competent counsel and right to appeal are preserved. These two interests are not mutually exclusive.

The issue to be resolved by this Court is whether the door to equal justice will be bolted shut to parents who face among the most severe forms of state action, the destruction of the parent-child relationship, due to the fault of their court-appointed counsel. The important rights at stake in juvenile dependency proceedings can be reconciled with a process that allows a notice of appeal to be deemed constructively filed when a parent has met certain criteria akin to the factors set forth in *Benoit*, which has proven to be a workable framework for nearly 50 years.

B. A Request For Relief Under The Constructive Filing Doctrine Is Not A Collateral Challenge To A Final Judgment.

Respondent argues that "sound public policy and precedent hold that appellate courts have no jurisdiction to consider untimely appeals in juvenile dependency cases," that the "late filing of a notice of appeal is an absolute bar to appellate court jurisdiction," and that a "parent cannot collaterally challenge a final non-modifiable order as it relates to child custody." (RBM 22-23.) This argument is flawed for several reasons.

First, respondent ignores the circumstances already permitted in dependency proceedings that allow a notice of

appeal to proceed outside of the sixty-day jurisdictional requirement. (See AOBM 29-30; Rules 8.25(b)(5), 5.560(f), 5.725(h), 5.590(h), 8.406(a)(2),(3), 8.406(b), 8.454(e).)

Second, the constructive filing doctrine is not an exception to the jurisdictional requirement. It does not seek to extend the time to file a notice of appeal. Rather it redefines the point at which notice is deemed filed in line with reason, fairness, and justice. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 126.) It allows a notice of appeal to be constructively filed when there are compelling reasons to do so to ensure equality of access to the courts. (*Id*. at pp. 121, 128.)

Finally, mother's request that her notice of appeal be constructively filed due to the ineffective assistance of her counsel is not a collateral challenge. A collateral challenge is a "judicial reexamination of a judgment or claim in a proceeding *outside of the direct review process*." (*Wall v. Kholi* (2011) 562 U.S. 545, 553, emphasis added.) Collateral review is generally raised by a petition for writ of habeas corpus. (*Id*. at p. 552.) Section 366.26, subdivision (i)(1) prohibits the collateral attack of a termination order. However, the statute expressly states that "nothing in this section shall be construed to limit the right to appeal the order." Mother had a right to appeal the order terminating her parental rights.

The cases relied upon by respondent, *Adoption of Alexander S.* (1988) 44 Cal.3d 857 and *Ex Parte Miller* (1895) 109 Cal. 643, are inapposite to the issue currently facing this Court.[4]

Ex Parte Miller, supra, 109 Cal. 643, involved a collateral challenge by parents to the appointment of a guardian for their child. The parents were present at the hearing when a guardian was appointed and did not raise any objection. (*Id*. at p. 645.) After the time to file a notice of appeal had passed, the parents filed a writ of habeas corpus petition asserting a right to custody of the child. (*Id*. at p. 647.) Because the parents did not raise any objection at the guardianship hearing, this Court stated that the parents could not file a petition for writ of habeas corpus to assert a right to custody of the child. (*Ibid*.)

Ex Parte Miller was decided approximately sixty-five years before the juvenile dependency statutory scheme was created and almost 100 years before the "sweeping revisions" of the current statutory scheme were implemented. (Cal.Juv.Dep.Prac. (2019) § 1.1 at p. 2; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1660-1661.) *Ex Parte Miller* did not involve a parent who expressed a desire to appeal the decision during the statutory sixty-day period and did not involve ineffective assistance of counsel. *Ex Parte Miller* is not relevant to the present case.

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[4] To the extent *Ex Parte Miller* is the "centuries-old precedent" respondent asks this Court not to reverse (see RBM 10), *Ex Parte Miller*, which was decided approximately 125 years ago, does not involve ineffective assistance of counsel or the constructive filing doctrine. Moreover, the constructive filing doctrine was introduced in 1947. (See *People v. Slobodian* (1947) 30 Cal.2d 362.) There is no "centuries-old precedent" at issue in this case.

In *Adoption of Alexander S., supra*, 44 Cal.3d 857 is also not determinative on the issue presented to this Court. In *Alexander S.*, this Court addressed whether the Court of Appeal had jurisdiction to address claims in a habeas petition that arose from mother's petition to withdraw consent to an adoption. (*Id.* at p. 859.) Mother, represented by an attorney who specialized in private adoptions, entered into an agreement for a couple to adopt her child in exchange for payment of mother's medical and living expenses. (*Id.* at p. 860.) Mother later changed her mind and sought to withdraw her consent. She retained a new attorney. A five-day trial occurred that was limited to resolving mother's motion for visitation and petition for withdrawal of consent. (*Id.* at p. 861.) The trial court denied mother's petition to withdraw consent on January 3, 1985. The notice of entry of judgement was mailed to mother on January 30, 1985. No notice of appeal was filed and the judgment denying the petition to withdraw consent became final on April 1, 1985. (*Id.* at p. 862.)

On April 26, 1985, the trial court issued a judgment denying mother's other petition to establish a father-child relationship. (*Adoption of Alexander S., supra*, 44 Cal.3d at p. 862.) Mother filed a timely notice of appeal from that judgment. In her brief on appeal, mother included her belated claims from the judgment denying withdrawal of her consent which had already become final. (*Id.* at p. 863.) The Court of Appeal recognized it did not have jurisdiction to reach the claim regarding the denial of mother's petition to withdraw consent but, without notice to the parties, chose to treat the belated

appeal as a petition for writ of habeas corpus. (*Id.* at p. 862.) The Court of Appeal issued a writ of habeas corpus and ordered the trial court to vacate its judgment denying mother's petition for withdrawal of consent to the adoption. (*Id.* at pp. 863-864.)

This Court found that the Court of Appeal committed multiple procedural errors, including that it lacked jurisdiction to overturn the trial court's decision denying mother's petition to withdraw consent to the adoption. (*Adoption of Alexander S., supra*, 44 Cal.3d at pp. 864, 868) Relying on *Ex Parte Miller*, this Court held that "[o]ut of concern for the welfare of children in adoption actions, we hold that 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."[5] (*Id.* at pp. 867-868.)

However, as with *Ex Parte Miller*, *Adoption of Alexander S.* does not help this Court to address the issue of a parent's right to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights. *Adoption of Alexander S.* was a collateral challenge to a decision that had already become final. In addition, *Adoption of Alexander S.* involved a private adoption, it was not a juvenile dependency proceeding, mother had retained an attorney, mother was college

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[5] This Court referenced the United States Supreme Court's decision in *Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, where the Court held that federal habeas corpus could not be used to litigate constitutional claims in child custody matters. (*Alexander S., supra,* 44 Cal.3d at p. 868.) *Lehman* is also not helpful to this Court as it involved a federal habeas corpus claim which is not at issue in this case.

educated, mother did not request that a notice of appeal be filed within the 60-day statutory deadline, and there was no issue raised that her retained attorney did not file a timely notice of appeal.

Mother maintains that the constructive filing doctrine should be available to parents in juvenile dependency proceedings to ensure that when a party has made a timely request to their court appointed attorney to file a notice of appeal, the ineffective assistance of that counsel should not deprive a party of access to justice. There is nothing in *Ex Parte Miller*, *Adoption of Alexander S.* or *Lehman* that suggests otherwise.

C. The Doctrine Of Constructive Filing Is Not Incompatible With Juvenile Dependency Proceedings.

Respondent argues that the doctrine of constructive filing should only be applicable to incarcerated persons and is incompatible with juvenile dependency proceedings because of the "strong public policy interest in finality and 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." (RBM 26.) Respondent warns against the "indiscriminate" application of the doctrine. (RBM 28-29.) These concerns are unwarranted.

The constructive filing doctrine was developed to ensure litigants were not denied access to justice on appeal as a result of circumstances beyond their control. The constructive filing doctrine can be reduced to a simple issue: Should a person lose his or her right to appeal when the notice of appeal is filed late

due to no fault of their own. (See *People v. Slobodian* (1947) 30 Cal.2d 362, 368 (conc.opn. of Carter, J.).) The Courts that have protected the appealing party have focused on the party being "lulled into a sense of security" by the actions of state officials and their trial attorney. (See *People v. Head* (1956) 46 Cal.2d 886, 889 [defendant timely filed the notice of appeal as far as was possible for him to do so or was "lulled into a sense of security by prison officials"]; *In re Gonsalves* (1957) 48 Cal.2d 638, 646 [prisoner did all he could in compliance with jail rules to institute an appeal but the notice vanished and did not reach the clerk of the court]; *People v. Calloway* (1954) 127 Cal.App.2d 504, 507 [defendant "lulled into a false sense of security" by the prison advisory counsel, a representative of the state]; *People v. Martin* (1963) 60 Cal.2d 615, 619, [self-represented defendant was "lulled into a false sense of security" by trial judge].)

In *In re Benoit, supra,* 10 Cal.3d 72, this Court provided guidance as to when and how the constructive filing doctrine could be applied. This Court recognized the interests of justice at play and extended the doctrine to situations where an "appellant may be lulled into a false sense of security in believing that an attorney – especially his trial attorney – will carry out his undertaken task." (*Id*. at p. 87.) However, a defendant could not utilize the constructive filing doctrine as an excuse. The *Benoit* Court required the following factors be shown: 1) justifiable reliance on the attorney to file a notice of appeal, 2) due diligence in assuring him or herself that a notice of appeal was being

timely filed, and 3) the ineffective assistance of counsel in failing to timely file such a notice. (*Id.* at pp. 86-89.)

In *Silverbrand v. County of Los Angeles, supra,* 46 Cal.4th 106, this Court extended the constructive filing doctrine to a self-represented prisoner's filing of a notice of appeal in a civil case for medical malpractice. This Court made clear that it found "no meaningful basis for distinguishing the appeal rights of self-represented prisoners from those of persons not in custody or from prisoners represented by counsel, simply because the appeal is civil in nature." (*Id.* at p. 121.) The applicable rules of court did not "prevent this court from extending the rule when there are compelling reasons to do so." (*Id.* at p. 128.)

Respondent argues that *People v. Snyder* (1990) 218 Cal.App.3d 480 did not expand to the constructive filing doctrine and the decision in *Snyder* should be limited to its facts. (RBM 31.) In addition, respondent maintains that the reasoning of Snyder was "inapplicable generally in dependency, as there are no provisions for a motion for new trial." (RBM 31.)

In *People v. Snyder, supra*, 218 Cal.App.3d 480, 494, the defendant obtained a new trial based primarily on the trial court's conclusion that the People's failure to file a written opposition to the new trial motion waived the right to oppose the motion. Based on this erroneous assumption by the trial court, the People were lulled into forgoing an appeal of the order granting defendant a new trial.

In its analysis of the constructive filing doctrine, Division One of the Fourth District Court of Appeal noted that while

incarceration was "generally" found in constructive filing cases, "neither 'incarceration' nor 'fault of others' is an absolute prerequisite to its application." (*People v. Snyder, supra*, 218 Cal.App.3d at p. 492.) Rather, the focus was on whether the party seeking to appeal was "lulled into a false sense of security" by either his or her attorney, state agents, or third parties. (*Id*. at p. 492.) The constructive filing doctrine was an "ameliorative doctrine" which could be applied where "slavish adherence to such deadlines …would violate more basic justice." (*Id*. at pp. 491-492.) Accordingly, the *Snyder* Court found the People were "entitled to the same judicial impartiality, fairness and due process rights as defendants." (*Id.* at p. 492.) The "interests of justice" were served by permitting the People an opportunity to appeal. (*Id*. at p. 494.)

Respondent's attempts to distinguish *Snyder* fall flat. The fact that there are no provisions for a motion for new trial in dependency proceedings or that it was the trial court – and not court-appointed counsel –that misled the People into a delayed filing does not mean that the underlying reasoning of the *Snyder* decision should be denied to parents in dependency appeals. The *Snyder* Court maintained its focus on the underpinnings of the doctrine – fairness and equal access to justice.

Incarceration of the defendant is not pivotal to the reasoning for granting constructive filing of the notice of appeal. Nevertheless, it is undeniable that the incarcerated defendant and a parent in juvenile dependency proceedings both face the deprivation of their fundamental liberty interests. The

destruction of the parent-child relationship has been described as one of the "most severe forms of state action." (*M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 105, 124.)

Reason, justice, and fairness require that the constructive filing doctrine have a place in parental termination proceedings conducted in juvenile dependency court. Applying the factors set forth in *Benoit*, the doctrine can be narrowly construed so as not to harm the jurisdictional underpinnings of the timely filing rule while also ensuring that a parent and child are not separated without a thorough review of the merits of the case. The failure of court-appointed counsel to file a timely notice of appeal upon request should not be imputed to the parent when the consequence of such a mistake results in the permanent loss of custody of a child without appellate review.

D. The Policy Considerations In The Juvenile Dependency System Do Not Bar Application Of The Constructive Filing Doctrine.

Respondent argues that the constructive filing doctrine should not be applied to juvenile dependency proceedings due to the existence of differing policy considerations. Respondent sets forth three policy considerations in support of its argument. First, a parent in a juvenile dependency proceeding is not physically barred from access to the court. (RBM 32-33) Second, there is a special need for finality in juvenile dependency proceedings. (RBM 33-37.) Third, expanding the doctrine would overburden dependency courts. (RBM 37-39.)

The application of the constructive filing doctrine, as contemplated in *Benoit*, to parents who face the termination of

parental rights will not negatively affect juvenile dependency proceedings. Rather, its application is essential to uphold the legislative intent of the protections offered to all parties by the statutory scheme applicable to juvenile dependency proceedings.

1. A Parent's Access To Justice Should Not Require Their Incarceration.

Respondent argues that, unlike an incarcerated person, a parent in a juvenile dependency proceeding does not face the same barriers to access the courts. Under its analysis, the constructive filing doctrine is "compelled only when the litigant is literally barred by prison walls from accessing the court and the litigant must depend entirely on state actors to have an appeal filed." (RBM 32-33.)

Respondent argues the parent did not need to rely on prison authorities to ensure that a notice of appeal was sent to the superior court and could "travel to the courthouse to ensure that notice has been filed or establish the date on which the court received the notice." The parent could also "choose to use mail or personally deliver the notice of appeal" or "call the court to determine whether the notice has been received and stamped." (RBM 32.)

Respondent's list of proposed self-help remedies fails to recognize the lack of resources that often makes these measures unavailable to indigent parents in dependency proceedings. The parent may not have a car or even access to public transportation to "travel to the courthouse." The parent may not understand how to establish the date on which the court received the notice of appeal, or understand that the notice of appeal must be

"received and stamped," or even how to call the court to follow up with the clerk to ensure notice has been filed. English may not be the parent's first language. The parent may have limited education, may have mental health issues, may have physical issues, may be in a residential treatment program and unable to use the phone or leave the premises, or may be in an abusive relationship and unable to take actions without risking violence. The obstacles that a parent may encounter to ensure that their notice of appeal has been filed are many.

Respondent's suggestions for a parent seeking to appeal a decision of the juvenile court ignores the most basic, reasonable, effective, and straightforward option available to the parent– to ask their counsel to file a timely notice of appeal. Counsel has been appointed by the state to represent the parent in these proceedings and is duty bound to be versed in the legal requirements and legal processes, which includes the timely filing of a notice of appeal. (§ 316, 317, subds. (a), (b), (d).) Requesting that their counsel preserve their right to appeal is a simple and efficient way to protect that right, a means on which a parent should be allowed to reasonably rely.

A parent's access to justice should not require that they be incarcerated.

2. A Child's Special Need For Finality Does Not Conflict With The Application Of The Constructive Filing Doctrine To Juvenile Dependency Proceedings.

Respondent argues that the doctrine of constructive filing should be rejected due to the "special need for speedy resolution and finality" in juvenile dependency proceedings. (RBM 33.) Respondent maintains that allowing a "parent to pursue a belated appeal would undermine the state's and minor's interest in finality and timely resolution." (RBM 33.) Respondent urges this Court to uphold the "compelling legislative interest" in providing stable, permanent homes for children by affirming that a "failure to timely file a notice of appeal is fatal to a parent's claim regardless of the reason for the failure." (RBM 37.)

As a threshold matter, respondent mischaracterized mother's appeal as "belated." (RBM 33.) Within five days of the juvenile court's decision to terminate her parental rights, mother notified her attorney that she wished to appeal the decision. (Mother's Declaration; Counsel's Declaration.) Mother did not make a belated request of her court-appointed counsel to file a notice of appeal. Instead, mother was diligent and took action fifty-five days prior to expiration of the statutory deadline. It was reasonable for mother to rely on her court-appointed counsel to perform the ministerial task of filing the requested notice of appeal.

Respondent's arguments are again predicated on mischaracterizations. Application of the constructive filing

doctrine in appropriate cases will not undermine the child and state's interest in finality and timely resolution. In fact, respondent recognized that mother's trial counsel noticed her error "only a few days" after the time for filing a notice of appeal had lapsed. (RBM 33, fn. 4.) However, respondent laments that "one can imagine a case where the error is not discovered for several months." (RBM 33, fn 4.)

The constructive filing doctrine as applied does not contemplate any extreme delays in the finality of a judgment. *Benoit* made clear that "indiscriminate" invocation of the constructive filing doctrine was not contemplated by this Court. (*In re Benoit, supra*, 10 Cal.3d at p. 89.) Instead, a parent would be required to show reasonable reliance of his or her attorney to file a notice of appeal, diligence in assuring that the notice of appeal is filed, and ineffective assistance of counsel in failing to timely file the notice. (*Id*. at pp. 86-89.)

In addition, respondent's reliance on *In re Isaac J*. (1992) 4 Cal.App.4th 525, *In re A.M.* (1989) 216 Cal.App.3d 319, and *In re J.A.* (2019) 43 Cal.App.5th 49, to support its position does not provide the necessary guidance to this Court under the current statutory scheme or in the same factual and procedural landscape.

In re Isaac J. and *In re A.M.* were decided under former Civil Code section 232 which has not been a part of the current statutory scheme for three decades. Furthermore, *In re Isaac J*. involved a collateral attack by father two months after the decision terminating his parental rights was finalized. (*In re*

Isaac J., supra, 4 Cal.App.4th at pp. 528, 529.) In its discussion of the constructive filing doctrine, the *Isaac J.* Court held that the remedy of habeas corpus could not be employed as a means of obtaining belated relief in proceedings under Civil Code section 232. (*Id*. at p. 534.)

In re A.M., supra, 216 Cal.App.3d 319 was also decided under the prior statutory scheme involving Civil Code section 232. The Court of Appeal determined that the child's "special need for finality in cases under section 232" was of paramount importance. (*Id*. at p. 322.) Mother informed her counsel that she wished to appeal shortly after receiving notice of the judgment terminating her parental rights. However, trial counsel was unable to reach mother to obtain her signature on the notice of appeal and the notice of appeal was not timely filed. (*Id*. at p. 321.) The Court's decision in *A.M.* did not apply or analyze the constructive filing doctrine to the current statutory scheme.

The recent case of *In re J.A*., *supra*, 43 Cal.App.5th 49 also did not discuss the application of the constructive filing doctrine in juvenile dependency proceedings. Mother's notice of appeal was filed sixteen months after the hearing at issue. This "extreme delay" (*id.* at p. 54) was not contemplated by *Benoit.* The mother in *J.A*. would most likely not succeed under an analysis using the *Benoit* factors because it was a "long closed dependency" (*id*. at p. 56) and mother would not be able to show diligence in assuring herself that the notice of appeal had been filed.

Application of the constructive filing doctrine to parents facing the termination of parental rights does not require a choice between finality and timely resolution on the one hand and the maintenance of fundamentally fair procedures on the other hand. Juvenile dependency proceedings involve fundamental rights that are protected by due process guarantees. (*In re Malinda S.* (1990) 51 Cal.3d 368, 383, fn. 17.) The irrevocable and complete severance of a parent-child relationship should be made on nothing less than a full and fair adjudication - which includes the related right to appeal - of the grounds alleged in support of such a "unique kind of deprivation." (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1707 [dependency proceedings "work a unique kind of deprivation"].)

As set forth in her opening brief, the state, the minor, and the parent all have important and compelling interests at stake in juvenile dependency proceedings. (AOB 54-59.)

The private interests at stake in juvenile dependency proceedings are those of the parent and his or her child. These interests are found to be "implicit in the liberty protected by the Fourteenth Amendment's due process clause." (*In re Sade C.* (1996) 13 Cal.4th 952, 987.) The parent has a fundamental liberty interest in the care, custody, and management of their child. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753; *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 27; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) The parent has a derivative liberty interest in the accuracy and justice of the resolution of his or her appeal. (*In re Sade C., supra,* 13 Cal.4th

at p. 988.) Likewise, the child has an important and compelling interest in a family home with his or her parents if possible or at least in a home that is stable. The child also has a derivative liberty interest in the accurate and just resolution of his or her parent's appeal. (*Id.* at pp. 988-989.)

The state has a "parens patraie interest in preserving and promoting the welfare of the child." (*Santosky v. Kramer, supra*, 455 U.S. at p. 766.) Consistent with that interest, the state also has an interest in the accurate and just resolution of the parent's appeal. (*In re Sade C., supra*, 13 Cal.4th at p. 989.)

The right to an appeal, and the time necessary to adjudicate that appeal, is built into the protections afforded to parents in juvenile dependency proceedings. Proceedings must be "concluded as rapidly as is consistent with fairness." (*Lassiter v. Dept. of Social Services, supra*, 452 U.S. at p. 32.)

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

3. Allowing Parents In Juvenile Dependency Proceedings To Utilize The Constructive Filing Doctrine Would Not Overburden Dependency Courts.

Respondent lastly warns that an "administrative nightmare" would occur if the constructive filing doctrine were expanded to include parents in juvenile dependency proceedings and would "cause continued delay in the finalization of the termination of parental rights." (RBM 37, 38.) Respondent argues that determining whether the notice of appeal was constructively filed would result in uncertainty for court clerks, time consuming collateral litigation, and "cripple the already overburdened and underfunded juvenile dependency system." (RBM 38, 39.)

Respondent makes these ominous predictions without explaining why or how this "nightmare" would occur.

In fact, the Rules of Court already provide a framework for the superior court clerk to follow when receiving a notice of appeal beyond the statutory sixty-day deadline. Rule 8.406(c) requires the clerk to 1) mark the late notice of appeal "Received [date] but not filed," 2) notify the party that the notice was not filed because it was late, and 3) send a copy of the marked notice of appeal to the district appellate project. (Rule 8.406(c).)

Once the superior court clerk performs these rule-based duties, responsibility then shifts to the appellate project to determine the next steps. The appellate projects were created to administer the appointment of appellate counsel for indigents in

criminal, juvenile delinquency, mental health commitment, and juvenile dependency appeals. (Rule 8.300(e)(1).) As stated, the appellate project then conducts an investigation to determine the appropriate course of action. This investigation may lead to a conclusion that the late-filed notice of appeal cannot be saved or, in criminal matters, may result in the filing of a "Benoit-based" motion seeking to have the notice of appeal deemed constructively filed. The Court of Appeal then reviews that motion to determine if the notice of appeal should be allowed to proceed.

This process does not involve either uncertainty or time-consuming collateral litigation. Rule 8.54 of the Rules of Court governs the filing of a constructive filing motion. Under rule 8.54, once a motion is filed, the other party has 15 days to respond, no reply is contemplated, and the Court of Appeal can rule on the motion immediately upon expiration of those 15 days. This process is timely, efficient, and ensures that a party is not unjustly deprived of their right to appeal.

Respondent's "administrative nightmare" scenario cannot be squared with the established rules already in place to handle constructive filing doctrine claims. *Benoit* has been on the books for nearly 50 years, and its advent has not proven to be an administrative nightmare or much of a burden at all on trial or appellate courts.

II. A Noticed Motion Is The Proper Procedure For A Parent To Raise A Claim That A Notice Of Appeal Was Not Timely Filed Due To Ineffective Assistance Of Counsel.

The question before this Court includes the proper procedure for a parent to use to raise a claim that their trial counsel failed to file a timely notice of appeal from an order terminating parental rights. Respondent argues that a "simple noticed motion is insufficient for the showing that must be required to potentially destabilize the placement for a dependent minor." (RBM 40.) Respondent maintains that the proper procedure for asserting an ineffective assistance of counsel claim in juvenile dependency proceedings is a petition for writ of habeas corpus. (RBM 40.)

Respondent fails to address the efficient process advanced – and since implemented - in *People v. Zarazua* (2009) 179 Cal.App.4th 1054, 1058, that allows a request for constructive filing to be brought by noticed motion. The *Zarazua* Court rejected the People's effort to require a defendant's request for constructive filing of an appeal be allowed only by petition for writ of habeas corpus filed first in the superior court. The *Zarazua* Court stated that an appellate court had jurisdiction to determine whether a notice of appeal had been constructively filed and that jurisdiction may be invoked by a noticed motion in the appellate court. (*Id.* at 1063.)

A noticed motion had been successfully used in appellate courts for the thirty years prior to the decision in *Zarazua* and has not been challenged since. (*People v. Zarazua, supra*, 179 Cal.App.4th at p. 1062.) There is no indication, and none cited by respondent, that a noticed motion procedure has wreaked havoc or caused any problems and would suddenly prove to be

unworkable in the dependency context. To the contrary, the *Zarazua* Court found it to be a very workable means of implementing the constructive filing doctrine. (*Ibid*.)

In contrast, respondent seeks to implement a time-consuming, onerous, and unattainable standard where a parent must show that his or her trial counsel was deficient and, that if the notice of appeal had been timely filed, it was reasonably probable that appeal would succeed. (RBM 43.) The law requires no such showing. At this stage, consideration of the merits of the parent's appeal is not at issue. As the United States Supreme Court has repeatedly made clear in a closely related context, "when counsel fails to file a requested appeal, a defendant is entitled to…an appeal without showing that his appeal would likely have had merit." (*Peguero v. United States* (1999) 526 U.S. 23, 28; see also *Garza v. Idaho* (2019) 586 U.S. __ [139 S.Ct. 738, 742]["when an attorney's deficient performance costs a defendant an appeal that the defendant would otherwise have pursued, prejudice to the defendant should be presumed 'with no further showing from the defendants of the merits of his underlying claims'"], quoting *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 484; *Rodriguez v. U.S.* (1969) 395 U.S. 327, 330 ["The Ninth Circuit seems to require an applicant…to show more than a simple deprivation of this right before relief can be accorded. It also requires him to show some likelihood of success on appeal; if the applicant is unlikely to succeed, the Ninth Circuit would characterize any denial of the right to appeal as a species of harmless error. We cannot subscribe to this approach."].) The

foregoing United States Supreme Court cases involved ineffective assistance of counsel claims under the Sixth Amendment, but there is no principled basis to require a different showing under the constructive filing doctrine where trial counsel has failed to live up to his or her duty to file a timely notice of appeal at his or her client's request.

Respondent's argument would require a parent - presumably without the assistance of counsel since trial counsel has been relieved and appellate counsel has not been appointed - to make multiple showings before being allowed to proceed with an appeal. It also conflates the filing of a notice of appeal with the process of assessing the merits of an appeal. It has been noted that,

> [T]he filing of the form notice of appeal in dependency cases is really nothing more than a clerical act: It is routinely signed by trial counsel or the appellant in propria persona without any real consideration of the potential merits of the appeal. Similarly, because counsel is appointed for indigent appellants before the appellate record is prepared, no meaningful consideration of the potential merits is conducted at this stage, either. *In truth, the first real examination of an appeal's potential for success comes months after the appellate ball has started rolling.*

(*In re Andrew B.* (1995) 40 Cal.App.4th 825, 857-858, emphasis added.)

Respondent proposes a requirement that a parent "must 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." (RBM 43) This is untenable. The filing of a

notice of appeal does not provide a party with information sufficient to determine the merits of an appeal. The Judicial Council JV-800 form only asks the parent and/or their attorney to state the date of order or describe the order that is being appealed. https://www.courts.ca.gov/documents/jv800.pdf.) The notice of appeal does not include a section requesting any discussion of the merits of any possible appeal or an analysis of its chance of success. Such a requirement would not be appropriate.

A notice of appeal is the beginning of the appellate process. Appellate counsel must still be appointed, the record must still be prepared and then reviewed by counsel for possible prejudicial error, the law must still be researched, and an opening brief must still be filed. (Rule 8.405(b)(1)(B), Rule 8.412.) In no circumstance would a parent be able to make the showing that respondent suggests.

Respondent's insistence that relief must be pursued via habeas petition, if implemented, would in actuality delay permanency for the child. A habeas petition requires much more than the steps outlined in rule 8.54[6] for motions. Habeas petitions, in most cases, involve a petition, an informal response, an informal reply, an order to show cause, a return, a traverse,

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[6] Pursuant to Rule 8.54, a party may serve a motion accompanied by a memorandum, and if necessary, declarations or other supporting evidence. Any opposition must be filed within fifteen days after the motion is filed. The court may rule on a motion at any time after an opposition is filed or the time to oppose has expired. On a party's request or its own motion, the court may place a motion of a calendar for a hearing.

an opportunity for oral argument, and an opinion. (Rule 4.551.) Because there can be no tactical reason for failing to file a notice of appeal (*Roe v. Flores-Ortega, supra*, 528 U.S. at p. 477), a noticed motion expeditiously provides the court with the information it needs to determine whether the notice of appeal should be constructively filed.

Respondent's argument that the constructive filing doctrine cannot apply to dependency cases is premised on the child's need for finality. (RBM 10.) However, this position is in direct conflict with their assertion that, if the constructive filing doctrine does apply to dependency proceedings, the vehicle for seeking relief should be the slower drawn out method of a habeas petition. These positions are irreconcilable.

A noticed motion has been used for over 40 years in the criminal context without causing unnecessary delays. (*People v. Zarazua, supra*, 179 Cal.App.4th 1054.) As set forth in mother's opening brief, a noticed motion is most appropriate procedure to use to ensure that a parent's right to appeal is protected while, at the same time, safeguarding the need for expeditious resolution of juvenile dependency matters. (AOBM 62-66.)

CONCLUSION

In his dissent to this Court's dismissal of an appeal in a civil matter that was filed one day late, Justice Tobriner – joined by Justice Mosk - stated, "We created the time limits on the filing of a notice of appeal for a purpose: to promote the speedy and efficient administration of justice. We should interpret and apply those limits not blindly, as do the majority, but with a sensitivity

to the objectives which those limits serve." (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 675 (dis.opn. of Tobriner, J.) Justice Tobriner maintained that, "juridical concepts, such as the concept of 'jurisdictional' time limits, are not the masters but the servants of the courts." (*Id.* at p. 679 (dis.opn. of Tobriner, J.).)

Justice Tobriner concluded,

> I submit that we sometimes become so enamored with procedural rules and requirements that we allow them to take on a sanctity and inviolability of their own. Let us not forget that the rules were designed to afford litigants an opportunity for fair trial, and that their viability lies in effecting functional justice. We do not mean, of course, that the rules should be grossly violated or that justice itself be delayed. But here the delay was miniscule; yet the majority, in order to block the litigant's appellate day in court, have themselves struck down decisions that allow it.

(*Ibid.*)

Respondent recognizes a parent's right to competent and effective assistance of counsel (RBM 10) but, seemingly "enamored with procedural rules and requirements" (*Hollister Convalescent Hosp., Inc. v. Rico*, supra, 15 Cal.3d at p. 679 (dis.opn. of Tobriner, J.) is willing to propose what it calls in its own words a "harsh" solution to this Court after conceding "the inadequacy of trial counsel was so egregious." (RBM 50). In contrast, mother proposed a solution that protected the important rights of the child to permanency and finality as well as a parent's right to fundamentally fair procedures, which includes their right to appeal.

Here, mother was diligent in requesting that her court appointed attorney file a notice of appeal. Five days after the juvenile court's order terminating her parental rights, her court appointed counsel was aware of her client's desire to appeal the ruling. Through no fault of mother, the notice of appeal was not filed until three days after the sixty-day deadline. Accordingly, when 1) a parent has been diligent in requesting that trial counsel file a notice of appeal for them, 2) a parent justifiably relies on their attorney's promise to file a notice of appeal, and 3) the attorney fails to timely file the notice of appeal, it should be deemed constructively filed and the appeal should proceed.

Absent appellate review, parental termination decrees - which involve fundamental constitutional interests and have been described as being among the most severe forms of state action - are irreversible. Accordingly, the state must not bolt the door to equal justice for parents facing this dire consequence simply because they reasonably chose to rely on their court-appointed counsel to file a notice of appeal for them.

Dated: September 8, 2020

Respectfully submitted,

JONATHAN SOGLIN
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/s/ Louise E. Collari

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CERTIFICATE OF WORD COUNT

Counsel for M.B. hereby certifies that this brief consists of **7,889** words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program.

Dated: September 8, 2020

/s/Louise E. Collari
LOUISE E. COLLARI
Staff Attorney

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE BY TRUEFILING

Re: *In re A.R.*　　　　Case No.: S260928

We, the undersigned, declare that we are over 18 years of age and not a party to the within cause. We are employed in the County of Alameda, State of California. Our business address is 475 Fourteenth Street, Suite 650, Oakland, CA, 94612. Our electronic service address is eservice@fdap.org. On September 8, 2020, we served a true copy of the **Appellant's Reply Brief on the Merits** attached on each of the following, by placing same in an envelope(s) addressed as follows:

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

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

M.B.
(Appellant Mother)

Each said envelope was sealed and the postage thereon fully prepaid. We are familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in Oakland, California, on that same day in the ordinary course of business.

On September 8, 2020, we transmitted a PDF version of this document by TrueFiling to the following:

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(occappeals.eservice@acgov.org)
(Respondent)

Alicia Park
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We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 8, 2020, at Oakland and El Cerrito, California.

/s/ Elizabeth Wilkie
Elizabeth Wilkie
Declarant for Postal Delivery

/s/ BL Palmer
BL Palmer
Declarant for TrueFiling

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Supreme Court of California

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9/8/2020

Date

/s/B Palmer

Signature

Collari, Louise (156244)

Last Name, First Name (PNum)

First District Appellate Project

Law Firm