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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.	Supreme Court Case No. **S260928**
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Petitioner and Respondent, vs. **M.B.**, Objector and Appellant.	Court of Appeals Case No. A158143 Alameda Superior Court Case No. JD-028398-02

After an Unpublished Order by the Court of Appeal for the First Appellate District, Division One, Filed January 21, 2020

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

RESPONDENT'S RESPONSE TO MINOR'S BRIEF ON THE MERITS PURSUANT TO THE COURT'S AUGUST 6, 2020 ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

I. INTRODUCTION 5

II. ARGUMENT 7

A. Because of the Compelling Interest in Stability and Permanency, the Constructive Filing Doctrine is Generally Inapplicable to Dependency Proceedings 7

B. Even if the Constructive Filing Doctrine Were Applicable to Dependency, Under the Standard Articulated by Appellant She Could Not Obtain Relief 8

1. Appellant Cannot Show Due Diligence 9

2. Appellant Cannot Show Both That Trial Counsel Provided Ineffective Assistance and That it Was More Probable the Result of the Proceeding Would Have Been Different 11

C. A Habeas Petition is the Proper Procedure to Assert an Ineffective Assistance of Counsel Claim 13

III. CONCLUSION 15

CERTIFICATE OF WORD COUNT 17

DECLARATION OF SERVICE 18

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Roe v. Flores-Ortega
(2000) 528 U.S. 470 11

Stanley v. Illinois
(1972) 405 U.S. 645 7

Strickland v. Washington
(1984) 466 U.S. 668 12

State Cases

In re A.M.
(1989) 216 Cal.App.3d 319 8

Adoption of Alexander S.
(1988) 44 Cal.3d 857 8

In re Ana C.
(2012) 204 Cal.App.4th 1317 12

In re Arturo A.
(1992) 8 Cal.App.4th 229 .... 12, 14

In re Benoit
(1973) 10 Cal.3d 72 .... 5, 9, 10

In re Carrie M.
(2001) 90 Cal.App.4th 530 14

In re Celine R.
(2003) 31 Cal.4th 45 7

In re Cody R.
(2018) 30 Cal.App.5th 381 .... 12, 14

Cynthia D. v. Superior Court
(1993) 5 Cal.4th 242 8

In re David B.
(1979) 91 Cal.App.3d 184 7

In re Emilye A.
(1992) 9 Cal.App.4th 1695 12

In re Ernesto R.
(2014) 230 Cal.App.4th 219 12

In re Isaac J.
(1992) 4 Cal.App.4th 525 .... 8, 11

In re Jackson W.
(2010) 184 Cal.App.4th 247 14

In re Kristin H.
(1996) 46 Cal.App.4th 1635 .... 5, 8, 14

In re Marilyn H.
(1993) 5 Cal.4th 295 7

In re Nada R.
(2001) 89 Cal.App.4th 1166 13

People v. Dowdell
(2014) 227 Cal.App.4th 1388 13

People v. Zarazua
(2009) 179 Cal.App.4th 1054 .... 10, 14, 15

State Statutes

Welfare and Institutions Code

§ 317.5 12

§ 317.5(a) 5

§ 366.26 5

Rules

California Rules of Court, Rule 8.25(b)(5) 8

I. INTRODUCTION

Respondent Alameda County Social Services Agency ("Agency") joins in the Minor's arguments because Minor's Brief on the Merits properly frames the issues by asserting that, for reasons of sound public policy and the minor's due process rights, an appeal must be dismissed if a notice of appeal is not timely filed. The question this Court asked is: "1. Does a parent in a juvenile dependency case have the right to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights under Welfare and Institutions Code section 366.26? (*See* Welf. & Inst. Code, § 317.5, subd. (a); *In re Kristin H.* (1996) 46 Cal.App.4th 1635 [ineffective assistance of counsel claim in dependency proceeding brought on a petition for writ of habeas corpus].)." Instead of truly addressing the Court's question regarding a parent's possible challenge for ineffective assistance of counsel, Appellant makes the argument that the constructive filing doctrine, as described in *In re Benoit* (1973) 10 Cal.3d 72, which is primarily applied to incarcerated persons, should be expanded to dependency. In this case, Appellant argues that the constructive filing doctrine could be used to allow a parent to show that, by informing someone in her trial counsel's office that she intended to appeal within the appellate time frame, the court of appeal should consider the appeal constructively filed.

This Court must affirm that a late filed notice of appeal is fatal to an appeal of the termination of parental rights regardless of the reason. It is neither fair, nor equitable, to change the status quo. It is not fair to the minor who has been in a stable placement for years and who is anxiously awaiting permanency through adoption to allow an appeal that was not

timely filed to proceed. It does not promote equal access to the courts to allow a parent who did nothing more than make one phone call to her trial counsel's office to resurrect an appeal that lacks merit.

Appellant asserts that the constructive filing doctrine merely recognizes that certain efforts to perfect an appeal taken within the appellate time frame may be deemed to constitute a timely filing of an appeal, even when the notice of appeal is actually filed late. What Appellant wants this Court to ignore is that in most other contexts, an appeal filed a few days or even a few months after the appellate time frame has expired is not necessarily harmful to either the prosecution or defense. But, the dependency context is materially different. On that sixty-first day after the termination of parental rights, the court, the minor, the social services agency, and the prospective adoptive parents could move forward and finalize an adoption. Even if the appeal were to be considered timely under the constructive filing doctrine, the most important party – the minor – would still suffer from a belated appeal. To potentially destabilize the well-being of a dependent minor by permitting the court of appeal to proceed with an appeal after all interested parties were prepared to finalize an adoption is too high a cost.

Appellant continues to insist that the interest in accuracy of findings and orders in dependency proceedings is not mutually exclusive with a minor's interest in stability and permanency. If that is so, and this Court were to provide a mechanism for a parent to assert that her attorney provided ineffective of assistance of counsel by not filing a notice of appeal, it must also require a heightened standard requiring a parent to show that the accuracy of the trial court's findings and orders is in question.

This heightened standard is necessary precisely to ensure that the interest in accuracy of findings does not trump the state's and the minor's compelling interest in stability and permanency.

II. ARGUMENT

A. Because of the Compelling Interest in Stability and Permanency, the Constructive Filing Doctrine is Generally Inapplicable to Dependency Proceedings

This Court and the Legislature have made clear that the minor's well-being must be centered when considering the dependency scheme. It is axiomatic that nearly every decision the juvenile court makes involves a finding regarding the best interests of the minor. "Although a parent's interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [citing *In re David B.*, (1979) 91 Cal.App.3d 184, 192-93, 195, *Stanley v. Illinois* (1972) 405 U.S. 645, 649.].)

"The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful." (*Id.*) This compelling interest "requires the court to concentrate its efforts, once reunification services have been terminated, on the child's placement and well-being, rather than on a parent's challenge to a custody order." (*Id.*) At this stage of the dependency proceedings, "it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home." (*In re Celine R.* (2003)

31 Cal.4th 45, 53 [quoting *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.].) Interests of the state, parent, and child are not mutually exclusive, but when they do conflict, especially at the point of termination of parental rights, the child's interest in finality should prevail. (*See In re Kristin H., supra,* 46 Cal.App.4th at p. 1664.)

The Agency is not advocating that a parent's right to appeal a termination order should be limited; rather it is because of the compelling interest of the minor for finality, that the ramifications of expanding the constructive filing doctrine must be carefully considered. The Agency joins in the Minor's position that the constructive filing doctrine should be held inapplicable to dependency actions based on the sound reasoning of *Adoption of Alexander S.* (1988) 44 Cal.3d 857, *In re Isaac J.* (1992) 4 Cal.App.4th 525, and *In re A.M.* (1989) 216 Cal.App.3d 319.

B. Even if the Constructive Filing Doctrine Were Applicable to Dependency, Under the Standard Articulated by Appellant She Could Not Obtain Relief

Appellant seeks for this Court to expand the constructive filing doctrine to juvenile dependency proceedings generally.[1] Appellant describes the constructive filing doctrine as being 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." (Appellant's Reply Brief at 18-19.)

[1] The Agency also recognizes that there are times in which exceptions to the bright line 60 day rule are made, when the theory of the prison delivery rule is deemed to apply because the parent is an inmate or a patient in a custodial institution, and mailed or delivered to custodial officials for mailing to the clerk's office within the period for filing the document. (*See* Rule 8.25(b)(5).) Applying this rule would likely only result in a short delay as the notice had been delivered for mailing within the requisite time frame.

But, as pointed out by Minor's Brief, that is an oversimplification of the doctrine. The doctrine, as developed by *In re Benoit,* is not based solely on a "no fault" standard. There must be a higher standard that shows due diligence. *In re Benoit* (1973) 10 Cal.3d 72 requires it. 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. (*In re Benoit, supra*, 10 Cal.3d at pp. 86-89.) Additionally, if the reasoning of *In re Benoit* were to be applicable to juvenile dependency proceedings, one must further consider how courts analyze ineffective assistance of counsel claims in juvenile dependency proceedings.

1. Appellant Cannot Show Due Diligence

Even if the *Benoit* factors were applicable to dependency, Appellant cannot show the second factor of due diligence. As noted by the Minor, Appellant characterizes her actions as "diligent," but the record belies that characterization. Instead, the only evidence submitted shows that Appellant "informed my attorney that I wished to appeal the decision." (Declaration of Mariah B. at ¶7.) Appellant's attorney declares that she "learned that Ms. B. wished to file a notice of appeal on June 17, 2019." (Declaration of Rita Rodriguez at ¶4.) There is no evidence that Appellant followed up with anyone in Ms. Rodriguez's office regarding whether the notice of appeal was filed, or evidence that Appellant attempted to follow up with the court clerk regarding the filing of a notice of appeal. This lack of diligence is in contrast to the incarcerated defendant in *Benoit.*

> When petitioner Benoit was sentenced, Mr. Redmon, his appointed counsel, informed the court that he would 'make available tomorrow . . . for the Notice of Appeal.' At that meeting Mr. Redmon informed petitioner Benoit that he had grounds for appeal. Petitioner Benoit asked Mr. Redmon to file his notice of appeal. Immediately thereafter, petitioner Benoit was transferred to Monterey County for trial upon another charge. Upon arrival petitioner Benoit informed Mr. Goyne, his Monterey appointed counsel, that he was appealing his Shasta County conviction and that he wished Mr. Goyne to make sure that Mr. Redmon did file the appeal. Mr. Goyne inquired and was assured by Mr. Redmon's secretary that the appeal was being processed. At petitioner Benoit's apparently repeated insistence, Mr. Goyne later rechecked and discovered that Mr. Redmon had not filed the notice of appeal and so himself filed what he thought was a timely notice on April 24, 1972. The notice turned out to be 10 days late because petitioner Benoit had mistakenly misinformed Mr. Goyne as to the actual date of sentencing.

(*In re Benoit, supra*, 10 Cal.3d at p. 87.) Petitioner Benoit's diligence is precisely why the court extended the constructive filing doctrine to these circumstances. (*Id.* at 89.) The other petitioner at issue in *In re Benoit* received an express promise from his attorney that a notice of appeal would be filed ***and*** at or near the time the notice was due, inquired with the court clerk as to whether it was filed. (*Id.*) The Court held that the petitioner's diligent efforts combined with his counsel's explicit promise permitted the doctrine to apply. (*Id.*) The Court then held that, "we will not indiscriminately permit a defendant whose counsel has undertaken to file the notice of appeal, to invoke the doctrine of constructive filing when the defendant has displayed no diligence in seeing that his attorney has discharged this responsibility." (*Id.*; *see also People v. Zarazua* (2009) 179

Cal.App.4th 1054, 1061.) Here, Appellant displayed no diligence in ensuring that her attorney filed the notice of appeal. (*See* Minor's Brief at 46-47.)

Even the *Isaac J.* dissent by Justice Timlin, which Appellant relies on heavily in her Opening Brief, makes clear that an appellant cannot simply tell their counsel to file an appeal and then "forg[e]t about it." (*In re Issac J., supra,* 4 Cal.App.4th at p. 541 (dis. opn. of Timlin, J.).) The parent "must continue to bear some personal responsibility for assuring counsel's compliance with the requirements of the law." (*Id.*) "It is also arguable that, if a parent knows, or should know, of a pending adoption, a somewhat more stringent showing of "due diligence" likewise be required." (*Id.*) Those are precisely the facts here. The minor has been in the same home for most of her young life and there is nothing preventing her pending adoption but the current litigation.[2] (Minor's Brief at 11.) A more stringent showing of due diligence must be required over and above simply informing someone in the East Bay Family Defenders' office of the want to appeal the termination of parental rights during a single phone call and never following up.

2. Appellant Cannot Show Both That Trial Counsel Provided Ineffective Assistance and That it Was More Probable the Result of the Proceeding Would Have Been Different

Additionally, the Agency joins in Minor's arguments that a parent challenging the failure to file a timely notice of appeal requires a more robust showing of prejudice than required in *Roe v. Flores-Ortega* (2000)

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[2] Appellant states that the finality of the Section 366.26 orders is delayed by the appellate process itself but cites statistics that apply to all civil appeals, not just Section 366.26 fast-track appeals. (AOB at 58 n.15.)

528 U.S. 470, 484-85, due to the fundamental differences between criminal and dependency law.

Only since January 1995, when Section 317.5 was enacted, were all parties in dependency proceedings statutorily entitled to competent counsel. This statutory entitlement to counsel must be distinguished from the due process right to competent counsel under the federal constitution that has been found by the courts to exist in certain limited circumstances in dependency proceedings. (*See In re Arturo A.* (1992) 8 Cal.App.4th 229; *In re Emilye A.* (1992) 9 Cal.App.4th 1695.) To support an ineffective assistance of counsel claim in dependency there is a two-pronged test. "In the first step, we examine whether trial counsel acted in a manner expected of a reasonably competent attorney acting as a diligent advocate. If the answer is no, we move to the second step in which we examine whether, had counsel rendered competent service, the outcome of the proceeding would have been more favorable to the client." (*In re Ana C.* (2012) 204 Cal.App.4th 1317, 1329-30; *see also In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223["To prevail on the claim, appellant must show that counsel's representation fell below an objective standard of reasonableness and resulting in prejudice, i.e., had a section 388 petition been filed, it is reasonably probable that it would have been granted."].) The standard is whether there is a, "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Emilye A, supra,* 9 Cal.App.4th at p. 1711; *In re Cody R.*, (2018) 30 Cal.App.5th 381, 394 [citing *Strickland v.*

Washington (1984) 466 U.S. 668, 687-688, 693-694; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1407-08].)

If no prejudice is shown, the court may reject a claim of ineffective assistance of counsel without having to examine the question of whether counsel was actually ineffective. (*See In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.)

As argued in Respondent's Brief, Appellant cannot show that she was prejudiced by not pursuing the appeal. In Mother's Opening Brief, she asserted the most conclusory of arguments not supported by the record and there was no evidence that Mother had a beneficial relationship with the Minor such that an exception to the termination of parental rights applied. (Respondent's Answer Brief at 43-50.) No miscarriage of justice occurred despite the fact that Appellant's trial counsel failed to file a timely notice of appeal.

C. A Habeas Petition is the Proper Procedure to Assert an Ineffective Assistance of Counsel Claim

While Minor's counsel takes no position on the proper mechanism for a parent to challenge her counsel's failure to file a timely notice of appeal from an order terminating her parental rights, Minor asserts that any mechanism must require a heightened showing of detrimental reliance, diligence, and prejudice. (Minor's Brief at 45-49.) The Agency joins in the argument that any procedure for challenging a counsel's failure to file a timely notice of appeal from an order terminating parental rights must include a heightened showing akin to what is described in Minor's brief.

Moreover, it makes little sense to import a procedure that may be common in criminal law into dependency, when dependency already has a

mechanism for asserting an ineffective assistance of counsel claim – by habeas petition. (*See In re Kristen H.*, *supra,* 46 Cal.App.4th at pp. 1658-59; *In re Carrie M.* (2001) 90 Cal.App.4th 530, 533; *In re Cody R., supra.,* 30 Cal.App.5th at pp. 392-95.) In fact, it is generally recognized that claims of ineffective assistance of counsel are most appropriately raised through the filing of a writ of habeas corpus. (*See In re Jackson W.* (2010) 184 Cal.App.4th 247, 258-59.)

Requiring a parent to seek habeas relief is appropriate considering the heightened standard that must be shown in order for a parent to challenge her counsel's failure to file a timely notice of appeal from an order terminating parental rights. A habeas petition must be timely filed. (*See In re Kristin H., supra*, 46 Cal.App.4th at p. 1667.) It is well settled that a litigant seeking habeas relief must state fully and with particularity the facts on which relief is sought. [Citations]." (*In re Cody R., supra*, 30 Cal.App.5th at p. 394 [quotations and citations omitted].) This is a heavy burden. (*Id.*) Utilizing writ review as the vehicle for raising the claim of ineffective assistance of counsel allows the record to be supplemented with additional evidence, including declarations from trial counsel, the parent, or other individuals as appropriate. (*In re Arturo A., supra,* 8 Cal.App.4th at p. 243.)

Appellant again attempts to import a procedure that may be common in criminal law into dependency. Appellant heavily relies on *People v. Zarazua* (2009) 179 Cal.App.4th 1054, to support her proposition that a parent's request for constructive filing should be through a noticed motion. (Appellant's Opening Brief at 63-66; Reply Brief at 32-36.) First, that case recognizes that courts have permitted both petition for writ of habeas

corpus or a motion procedure, and that the People had not previously objected to the motion procedure. (*People v. Zarazua, supra*, 179 Cal.App.4th at pp. 1062-63.) While it may be true that in criminal proceedings one can raise a constructive filing issue by motion or by habeas petition, dependency proceedings already have a working process to assert ineffective assistance of counsel claims which recognizes a heightened standard that must be met.

III. CONCLUSION

This Court must affirm precedent and sound public policy and continue to hold that a failure to file a timely notice of appeal is jurisdictional, and there is no mechanism for a parent to challenge a counsel's failure to file a notice of appeal after the termination of parental rights. This bright line rule makes sense because at this point in the dependency proceedings, the interests of the parent and the minor collide, and the interest in finality in a stable and permanent home outweighs the parent's interest.

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

DATED: September 17, 2020

DONNA R. ZIEGLER,

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

By /s/ Samantha N. Stonework-Hand
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I, Samantha Stonework-Hand, Senior Deputy County Counsel, certify under penalty of perjury that, according to the computer program Microsoft Word 2016, with which this Answer to Petition was produced, the response contains approximately 3,196 words.

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By: /s/ Samantha N. Stonework-Hand
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Frances Chen

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