IN THE SUPREME COURT 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-028298-02)

APPELLANT'S RESPONSE TO MINOR'S BRIEF ON THE MERITS

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JONATHAN SOGLIN
Executive Director

LOUISE E. COLLARI
(Bar No. A156244)
Staff Attorney
First District Appellate Project
475 Fourteenth Street, Suite 650
Oakland, CA 94612
Telephone: (415) 495-3119
Email: lcollari@fdap.org

Attorneys for Appellant, M.B.

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INTRODUCTION

The question presented to this Court is whether a parent in a juvenile dependency case has the right to challenge court-appointed counsel's failure to file a timely notice of appeal from an order terminating her parental rights and obtain relief under the constructive filing doctrine.

Minor argues there should be a "closed-door policy" and that a parent should not be granted relief under the constructive filing doctrine or by any other means. (MBM[1] 10, 12, 50.) To

[1] Minor's brief on the merits will be referred to as MBM.

support its position, minor advances several arguments that are based on misconceptions about the constructive filing doctrine and its application in juvenile dependency proceedings. Contrary to minor's assertions, this is not a request to extend the jurisdictional time limits to file a notice of appeal. It is also not a collateral attack on an order terminating parental rights.

The issue before this Court is whether a parent, facing the termination of parental rights, should be left without recourse when court-appointed counsel fails to file a notice of appeal as requested. Answering this question does not require an evaluation of the merits of mother's appeal. Instead, the focus must be on the actions that mother and her court-appointed counsel took within the sixty-days to file a notice of appeal.

Mother contends that fairness, reason, and justice compel the conclusion that a parent's right to pursue an appeal should not be forfeited when their court-appointed attorney fails to timely file the notice of appeal as requested.

As minor's brief on the merits joins and repeats many of the arguments raised by respondent in its brief, mother will limit her response to those matters requiring clarification or correction. The failure to address or reassert any issues raised in mother's opening brief on the merits is not intended to constitute waiver or abandonment of those issues, but reflects mother's assessment that the issue has been adequately addressed and opposing positions of the parties have been fully argued.

ARGUMENT

I. The Constructive Filing Doctrine Does Not Extend the Jurisdictional Requirements To File A Notice Of Appeal.

The constructive filing doctrine developed to ensure "equality of access to our courts." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 121, 128.) The doctrine does not extend the time to file a notice of appeal or abrogate the jurisdictional requirements. Instead, the purpose of the constructive filing doctrine is to "redefine the point at which notice is deemed filed" in line with reason, fairness, and justice. (*Id*. at p. 126.)

The constructive filing doctrine evolved so that a litigant, who was lulled into a sense of security by state officials, would not be denied access to justice on appeal. Under the framework established by this Court in *In re Benoit* (1973) 10 Cal.3d 72, there must be a showing of 1) justifiable reliance by the defendant on his or her attorney to file a notice of appeal, 2) the due diligence of the defendant in assuring himself or herself that a notice of appeal was being timely filed, and 3) the ineffective assistance of counsel in nevertheless failing to timely file such a notice. (*Id.* at pp. 86-89.) The constructive filing doctrine recognizes that a notice of appeal may be preserved when the party seeking to appeal has acted within the jurisdictional time

period to pursue an appeal even though the notice of appeal was filed after the required time limit.[2]

Despite minor's claims, this is not an effort by a parent to "seek appellate jurisdiction by blaming the failure of trial counsel to file a timely notice of appeal" or an attempt to "override jurisdictional requirements." (MBM 12, 33.)

The *Benoit* framework has proven effective for nearly 50 years and can be applied to juvenile dependency proceedings without affecting a child's need for finality. In the interests of fairness, justice, and reason, parents in juvenile dependency proceedings who ask their court-appointed attorney to file a notice of appeal should be allowed to challenge their court-appointed attorney's failure to carry out that crucial task.

II. The Constructive Filing Doctrine And Other Procedures Have Been Extended To Parents In Juvenile Dependency Proceedings To Ensure A Parent's Right To Appeal Is Not Unjustly Denied.

Minor argues that a parent "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." (MBM 10.) In support of its position, minor incorrectly asserts that there has been "no extension" of the constructive filing doctrine to dependency proceedings. (MBM 36.) Furthermore, minor ignores the multiple situations where "other procedure[s]" (MBM 10) have been implemented in the

[2] "Constructive" has been defined as a "legal fiction for treating a situation as if it were actually so." (https://legal-dictionary.thefreedictionary.com/constructive.)

juvenile dependency system to ensure that a party is not unfairly denied their right to appeal.

For example, a notice of appeal has been deemed constructively - and therefore timely - filed in the following circumstances:

1. Parents who are inmates or patients in custodial institutions can use the constructive filing doctrine if the superior court clerk receives their notice of appeal after the sixty-day deadline. (Cal. Rules of Court[3], rule 8.25(b)(5); see Seiser & Kumli, Cal. Juv. Cts. Prac. & Proc. (2020) § 2.190[4], 2-757 [the "expansion of the constructive filing doctrine is now a general provision of the court rules applicable to all types of cases, including dependency cases, involving inmates or patients in custodial institutions."].)

2. The court can correct a clerk's failure to comply with its duties to file a notice of appeal at any time. (Rules 5.560 (f), 8.405(b)(6).)

Also, other procedures have been implemented which allow a notice of appeal to be filed past the sixty-day timeline:

1. In matters heard by a referee not acting as a temporary judge, the notice of appeal must be filed within 60 days after the referee's order becomes final.[4] (Rule 8.406(a)(2),(3).)

2. Any other party's time to appeal from the same judgment is either sixty days or twenty days after the superior court clerk mails notification of the first appeal, whichever is later. (Rule 8.406(b).)

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

[4] Generally, a notice of appeal must be filed within sixty days after pronouncement of the order in open court. (Rule 8.406(a).)

3. Failure to advise parties of their right to appeal can extend the time to file a notice of appeal. (Rules 5.725(h), 5.590(a); *In re A.O.* (2015) 242 Cal.App.4th 145, 147.)

4. An appeal of a section 362.4 juvenile custody order made upon termination of juvenile court jurisdiction must be filed sixty days after the issuance and filing of the written order. (*In re Markhaus V.* (1989) 211 Cal.App.3d 1331, 1337.)

These "other procedures" (MBM 10) already have been established in juvenile dependency proceedings to ensure that "slavish adherence" to deadlines does not violate more basic justice. (*People v. Snyder* (1990) 218 Cal.App.3d 480, 491-492.) In these situations, the "uniqueness of the dependency system," the "fundamental fairness," and the "minor's interests in stability and permanency" (MBM 10) are maintained while not impeding a parent's ability to pursue an appeal.

The constructive filing doctrine does not extend the jurisdictional requirements of a notice of appeal. Instead, its purpose is to ensure that parents facing the termination of parental rights are protected from the ineffective assistance of their court-appointed counsel.

III. The Constructive Filing Doctrine Can And Should Apply To Juvenile Dependency Proceedings.

Minor contends that the constructive filing doctrine has no application in dependency proceedings due to the "public policy of permanency and stability for dependent minors." (MBM 36.) Minor warns that there are fundamental differences between criminal law and dependency law which makes applying the

constructive filing doctrine to parents "problematic." (MBM 43-45.) Minor cites to the "issue of origin" of the right to counsel and various "practical" and "procedural" differences to support its argument. (MBM 43-45.)

Parents in dependency proceedings have a statutory right to counsel and a due process right to counsel on a case-by-case basis when termination of parental rights is at stake. (Welf. & Inst. Code[5] § 317.5; *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 31-32.) Criminal defendants have a Sixth Amendment right to counsel. (U.S. Const., 6th Amend.) Minor states, without explanation, that this difference in the origin of the right to effective assistance of counsel makes the application of the constructive filing doctrine to juvenile dependency cases problematic. (MBM 43.) However, a court-appointed attorney's obligation to act on their client's request to file a notice of appeal is not dependent on the origin of their right to effective assistance of counsel. In fact, the Sixth Amendment right to counsel has not been a factor in this Court's discussion of the constructive filing doctrine; it is not mentioned in any of the seminal constructive filing doctrine decisions. (See *People v. Slobodian* (1947) 30 Cal.2d 362; *In re Benoit, supra,* 10 Cal.3d 72; *Silverbrand v. County of Los Angeles*, *supra*, 46 Cal.4th 106.) The difference in the origin of the right to effective assistance of counsel is irrelevant.

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

Minor joins in respondent's argument that a parent does not share the same difficulties in physically accessing the courthouse. (MBM 43, RBM[6] 32.) As discussed more fully in mother's reply brief on the merits, this argument dismisses the real obstacles facing parents in dependency proceedings, including language, economic, and educational barriers. (ARBM[7] 23-24.) Furthermore, it ignores the simple and, usually effective, option available to parents: to ask their court-appointed counsel to file a timely notice of appeal.

Without providing specifics, minor argues there is a "procedural difficulty in implementing a structure for determining the prejudice from a trial attorney's negligent late-filing of a notice of appeal." (MBM 44.) However, the prejudice from a negligent filing of a notice of appeal is clear: the parent is prevented from obtaining appellate review of the juvenile court's decision. (See *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 have otherwise pursued, prejudice to the defendant should be presumed 'with no further showing from the defendant of the merits of his underlying claims."]; *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 484.) There is no dispute that a parent in a dependency proceeding has a right to file a notice of appeal (§ 395), and a trial attorney is under a duty not to ignore their client's request to file a notice of appeal.

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[6] Respondent's brief on the merits will be referred to as RMB.
[7] Mother's reply brief on the merits to respondent's brief will be referred to as ARBM.

(*People v. Diehl* (1964) 62 Cal.2d 114, 118.) Any supposed procedural difficulties in determining the prejudice from court-appointed counsel's failure to timely file a notice of appeal as requested are non-existent.

Minor states there are "procedural differences in the way hearings are conducted and in the burden of persuasion required to make ultimate decisions." (MNM 44.) Without more explanation, the relevance of these procedural differences to the question before this Court is unclear.

Minor states that the dependency scheme is designed for the protection of minors. (MBM 44.) Mother agrees. (§§ 202, 300.2, 16501.1, subd. (a) [the goals of the dependency system are to ensure the safety, protection, and physical and emotional well-being of the child while preserving and strengthening the family when possible.].) However, the minor's interests and welfare do not exist in a vacuum devoid of any connection to the parent's interest in a full and fair adjudication of the juvenile court's decision to terminate parental rights. The child has a derivative liberty interest in an accurate and just resolution of his or her parent's appeal. (*In re Sade C.* (1996) 13 Cal.4th 952, 988.) As set forth in mother's opening brief, the goals of the dependency system can be upheld while allowing a parent to challenge their court-appointed counsel's failure to file a timely notice of appeal from an order terminating parental rights. (AOBM 54-59.)

Minor's reliance on *In re Celine R.* (2003) 31 Cal.4th 45 is incomplete as presented. (MBM 44.) In *Celine R.*, this Court addressed two issues: 1) whether the sibling relationship

exception to adoption required the juvenile court to consider the interests of the siblings or only detriment to the specific child at issue, and 2) under what circumstances the juvenile court must appoint separate counsel for each child. (*Id.* at pp. 49-50.) As minor noted, this Court explained that "reversal of an order of adoption might be contrary to child's best interests due to the child's right to a stable, permanent placement." (*Id.* at p. 59; MBM 44.) However, this Court also cautioned that courts "should strive to give the child this stable, permanent placement, and this full emotional commitment, *as promptly as reasonably possible consistent with protecting the parties' rights and making a reasonable decision*." (*Id.* at p. 59, emphasis added.) This Court did not suggest that protection of the minor's interest required forfeiture of the rights of other parties.

Finally, minor argues the "adversarial disparity" between criminal and dependency proceedings weighs against the application of the constructive filing doctrine. (MBM 45.) In support of this statement, minor cites to Justice Brauer's concurring opinion in *In re Micah S.* (1988) 198 Cal.App.3d 557. (MBM 45.) Justice Brauer expressed concern that under the statutory scheme in place at the time, the rights afforded to parents are "purchased at the expense of" the child. (*Id.* at p. 565 (conc. opn. of Brauer, J.).) This Court recognized that the prior statutory scheme resulted in "lengthy delays that had become common in dependency cases." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 302.)

After Justice Brauer's concurring opinion in *Micah S.*, the Legislature addressed these lengthy delays in its 1987 "comprehensive revision of laws affecting children." The Legislature created the current statutory scheme, which eliminated the separate civil action pursuant to Civil Code section 232 which had been required to terminate parental rights. (*In re Marilyn H., supra,* 5 Cal.4th at pp. 302-303.)

Several courts shared Justice Brauer's concerns when addressing, under the prior statutory scheme, whether a notice of appeal that was not filed within the jurisdictional time limits could be deemed timely filed. Those courts declined to apply the constructive filing doctrine to juvenile dependency proceeding due to the child's need for finality, which had not been protected under the Civil Code section 232 hearings. (See *In re A.M.* (1989) 216 Cal.App.3d 319, 322; *In re Isaac J.* (1992) 4 Cal.App.4th 525, 534-535; *In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254.)

However, the Legislature implemented the current statutory scheme to resolve those lengthy delays in finality that were inherent in the prior two-tiered system. "The task force reasoned that by eliminating the need to file the separate Civil Code Section 232 action, minors who are adoptable will no longer have to wait months and often years for the opportunity to be placed with an appropriate family on a permanent basis." [citations omitted].) (*In re Marilyn H., supra*, 5 Cal.4th at p. 303.) The prior system had "more delay built into its provisions." (*Id.* at p. 304.) Under the new scheme, the permanency hearing must be scheduled 120 days after the court decides that no further

reunification services shall be provided to the parent. (§ 366.21, subd. (g)(4).) The Legislature recognized the need for finality and ensured the minor's interest would be protected under the revised statutory scheme.

There are no procedural or practical differences in the juvenile dependency system that warrant denial of a parent's right to equal access to justice.

IV. The Sixty-Day Period To File A Notice Of Appeal Is The Relevant Focus For The Constructive Filing Doctrine.

As set forth by this Court, the constructive filing doctrine "redefine[s] the point at which notice is deemed filed" in line with reason, fairness and justice and does not extend the jurisdictional time frame to file a notice of appeal. (*Silverbrand v. County of Los Angeles, supra*, 46 Cal.4th at p. 126.) Before the doctrine can be applied, the party seeking an appeal must show: 1) the justifiable reliance of the party of his or her attorney to file a notice of appeal, 2) the due diligence of the party 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 the notice. (*In re Benoit, supra*, 10 Cal.3d at pp. 86-89.)

The inquiry as to whether or not a notice of appeal has been constructively filed is naturally limited to the events that occurred within the sixty-day time to file a notice of appeal. If the parent failed to take the necessary steps to file a notice of appeal within the sixty days, the inquiry is over, and the constructive filing doctrine will not apply.

However, like the respondent, minor attempts to re-frame the issue before this Court as a collateral attack on a final non-modifiable order. (MBM 14-18, RBM 22-25.) Minor argues 1) the Legislature has expressly limited modification of final termination orders, 2) habeas corpus cannot be used to collaterally attack an adoption-related action under *Alexander S.*, and 3) an adoption petition can be granted once a termination order is final. (MBM 14-17.)

Application of the constructive filing doctrine will not "infringe on the Legislative mandate of section 366.26, subdivision (i)." (MBM 15.) Section 366.26, subdivision (i)(1) states that the final order terminating parental rights is conclusive and binding, and the juvenile court shall have no power to set aside, change, or modify it. However, this provision expressly does not limit the parent's right to appeal the order. (§ 366.26, subd. (i)(1).) Because the application of the constructive filing doctrine is not a collateral attack, allowing a parent to challenge their court-appointed counsel's failure to timely file a notice of appeal will uphold, and not infringe, the express Legislative mandate that a parent's right to appeal not be unfairly limited.

As recently discussed in mother's reply to respondent's brief on the merits, *Adoption of Alexander S.* (1988) 44 Cal.3d 857, is not determinative of the issue before this Court. (ARBM 15-17.) *Adoption of Alexander S.* involved a collateral challenge to a decision that had already become final. (*Id.* at p. 863.) Furthermore, it was a private adoption, not a juvenile

dependency proceeding, mother had retained an attorney, and mother was college-educated. (*Id*. at pp. 859- 860.) Most importantly, the mother in *Alexander S.* did not request that a notice of appeal be filed within the sixty-day statutory deadline, and there was no issue raised that her retained attorney did not file a timely notice of appeal upon her request.

Minor erroneously claims that an adoption can be "finalized on day 61." While the process to "place the child for adoption" may begin on day 61, minor's assertion disregards the multiple-step process that must be implemented before an adoption is actually finalized. (See generally Cal.Code.Regs., tit. 22; Rules 5.730; Fam. Code §§ 7840-7842, 7850, 7851; §§ 366.26, 366.3.)

The first step to a finalized adoption is the juvenile court's order to terminate parental rights and identify adoption as the permanent plan. (Rule 5.725(g); Cal. Code. Regs., tit. 22 §§ 35128, subd. (b), 35199, subd. (b).) At the section 366.26 hearing, the juvenile court will then set a six-month review date to review the child's status and the progress towards adoption. (§§ 366.3; 16503, subd. (a).) However, after the order terminating parental rights, an adoption petition must be filed, an adoption placement agreement must be signed, the Agency must prepare a report, and a hearing must be scheduled. (Cal.Code Regs., tit. 22 §§ 35199, subd. (b), 35203, subd. (b),(c)(3), 35211, subd. (b); Fam. Code §§ 7840-7842, 7850, 7851; Rule 5.730.)

Given all of these requirements, it is improbable that an adoption could be finalized on the sixty-first day, as minor suggests. Moreover, in this case, the adoption was *not* finalized

on the sixty-first day. The order terminating parental rights was made on June 12, 2019. (2CT 428-430.) The matter was continued for six months for a review hearing and it was noted that the "likely date by which the Agency will finalize the permanent plan is December 20, 2019. (2CT 429.) The Agency's November 20, 2019 section 366.3 status review report stated that parental rights were terminated on June 12, 2019, and the Agency was given care, custody and control of the child for "adoptive planning and placement." (2CT 483.) The adoption assessment was completed on October 30, 2019 and the "likely date" the Agency would finalize the permanent plan was May 20, 2020. (2CT 492, 493.)

Furthermore, the finalization of adoption, not the termination of parental rights, creates a parent-child relationship between the child and new adoptive parents.[8] (See MBM 18; Family Code § 8617 [from the time of the adoption, the existing parents are relieved of all parental duties and have no right over the child.]

Minor and respondent's position that allowing a parent to challenge their court-appointed counsel's failure to timely file a notice of appeal amounts to a collateral attack is incorrect. There is no fear of "undo[ing] a final non-modifiable termination order" if the constructive filing doctrine is applied in those situations

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[8] Minor also included a statement that minors are protected from a failed adoption after a final termination order based on section 366.26, subdivision(i)(3). (MBM 17-18.) This statutory provision's relevance to either the constructive filing doctrine or the finality of a termination order is unclear.

where a parent made a timely request of their court-appointed counsel to file a notice of appeal and counsel failed to fulfill that promise. (MBM 14.)

V. Parents Are Entitled To Effective Assistance Of Counsel Throughout The Dependency Proceedings Including During The Sixty-Day Period To File A Notice Of Appeal.

Minor claims that "parents have a limited right to the effective assistance of counsel in dependency proceedings." (MBM 20-24.) This is incorrect.

The right to effective assistance of counsel is not conditional. It does not include exceptions or qualifications. The Legislature guaranteed parents in juvenile dependency proceedings not only the assistance of counsel but the assistance of competent counsel, including on appeal. (§§ 316, 317, 317.5, Rules 5.590(a)(3), 8.403(b)(2).) The addition in 1995 of the explicit right to competent counsel recognized that the right to counsel was of little value unless there was an expectation that counsel's assistance will be effective. (*In re Kristin H.* (1996) Cal.App.4th 1635, 1660.)

The decisions in *In re Arturo A.* (1992) 8 Cal.App.4th 229 and *In re Kirstin H., supra,* 46 Cal.App.4th 1635 do not support minor's efforts to limit a parent's right to effective assistance of counsel. The issue facing Division One of the Fourth District Court of Appeal in *Arturo A.* was whether a parent could challenge, in an appeal from the section 366.26 order terminating parental rights, rulings made eight months *prior* at a section 366.22 eighteen-month review hearing. (*Id.* at pp. 234-235.) Also,

Arturo A. was decided in 1992, when a parent did not have a codified right to competent counsel. It was not until 1995 that the Legislature enacted section 317.5 which added the provision that parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel.[9]

In *In re Kristin H.*, the Sixth District Court of Appeal considered the nature of the statutory right to competent counsel. The *Kristin H.* Court concluded that the "express provision for competent counsel for parents and children in dependency proceedings was intended to include a right to judicial review of claims of incompetence of counsel." (*In re Kristin H., supra*, 46 Cal.App.4th at p. 1642.) *Kristin H.* made clear that where termination of parental rights may result, an indigent parent had a statutory right to competent counsel and due process right to effective assistance of counsel. (*Id.* at p. 1659.) The *Kristin H.* Court noted that the new statutory right to competent counsel for parents in dependency proceedings addressed "the problem of a lack of any meaningful process whereby parents or dependent children can complain about their appointed counsel. (Assem.

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[9] The *Kristin H.* Court explained that the court in *Arturo A.* noted "some doubt remain[ed]" about the proposition that when a right to counsel is only statutory it does not include the right to competent assistance of counsel. (*In re Arturo A., supra,* 8 Cal.App.4th at p. 238.) However, whatever doubt remained in 1992, was put to rest in 1994 with the enactment of section 317.5, providing a specific right to competent counsel in dependency proceedings when counsel is appointed. (*In re Kristin H., supra*, 46 Cal.App.4th at p. 1667.)

Com. on Judiciary Rep., Apr. 13, 1994, Sen. Bill No. 783.)" (*Id.* at p. 1663.)

The fact that the *Kristin H.* Court and *Arturo A.* Court allowed a parent to raise a claim of ineffective assistance of counsel by writ of habeas corpus was not a "limitation" on the right to counsel as proposed by minor. (MBM 21.)

In fact, the *Kristin H.* Court addressed the overlapping interest a parent and child have in assuring the parent has received effective assistance of counsel.

> While we certainly agree that the child's interests should be given great weight in a proceeding involving parental rights, it may not always be true, and we do not believe it is in this case, that preventing the parent from asserting a timely claim of ineffective assistance of counsel furthers the interests of the child. '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.' [citations omitted.]

(*In re Kristin H., supra*, 46 Cal.App.4th at p. 1664.)

Minor's efforts to reframe the issue facing this Court into "whether a parent has the right to challenge the ineffectiveness of counsel past a final judgment terminating parental rights" must be rejected. (MBM 24.)

It is equally troubling that minor appears to advance a standard that requires more than one party to file a notice of appeal from the same hearing to give validity to the possible merits of any party's appeal.

> 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 else sought to appeal, shows that no other party observed any irregularities that made them believe appellate review was warranted.

(MBM 32.)

There is no case law, no statute, and no rule of court that requires a party who is seeking to appeal have the support or concurrence of any other party before asserting their right to appeal.

A parent's right to competent counsel continues through the period to file a notice of appeal, without exception or limitation.

VI. 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.

Minor joins respondent's argument that a "heightened showing" is required if the constructive filing doctrine is applied to dependency proceedings and that a parent much show they would "succeed on the merits of their challenge to the termination of parental rights." (MBM 45, 49.) Mother's reply to respondent's arguments is incorporated here by reference. (See ARBM, Arg. II.)

Mother responds to the arguments raised by minor that mother would not be entitled to relief under the standard outlined in *Benoit*. (MBM 46-47.) Minor argues mother could not show "justifiable reliance" or "due diligence" and, "due to her own

inaction[10]," mother was "just as much to blame for the failure to file [the notice of appeal] as her attorney." (MBM 46, 47.)

Minor's version of the facts is unsupported. Mother and trial counsel's declarations are clear. Mother stated that she contacted her trial attorney's office after the June 12, 2019 section 366.26 hearing and learned that her parental rights had been terminated. (Declaration of Mother attached to Appellant's Application for Relief from Default Filed in the Court of Appeal on December 27, 2019 (hereinafter Mother's Declaration).) She was told that she had a right to appeal the decision. (Mother's Declaration.) She then informed her attorney that she wished to appeal. (Mother's Declaration.) Her trial attorney's declaration stated that on June 17, 2019, she "learned" her client wished to file a notice of appeal. (Declaration of Rita Rodriguez attached to Appellant's Application for Relief from Default filed in the Court of Appeal on December 27, 2019 (hereinafter Counsel's Declaration).) Ms. Rodriguez intended to file the notice within one or two days of learning of a client's wish to appeal, as was her practice, but made a mistake in this case and forgot to file it. (Counsel's Declaration.)

Minor's insistence that there be "evidence of a direct communication between appellant and her attorney" is unnecessary and seeks to add an additional layer to a parent's

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[10] Minor's citation to *In re Ricky H.* (1992) 10 Cal.App.4th 552 is inapposite. In *Ricky H.,* it was appellant mother's "own deliberate decision not to pursue an appeal, not from a reasonable but disappointed reliance upon the promise of counsel to do so." (*Id.* at pp. 557, 560.)

effort to exercise their statutory right to appeal. (MBM 46.) The declarations demonstrate that mother's desire to file a notice of appeal had been communicated to her court-appointed counsel.

Court-appointed counsel in juvenile dependency proceedings are often overworked and underfunded. Counsel often spends long days in court and may not be available when a parent calls the office. Nevertheless, minor now seeks to institute another barrier to equal access to justice and require that a parent have a "direct communication" when it was clear that mother had communicated her desire to appeal and her attorney was aware of that wish to appeal just five days after the hearing terminating her parental rights. (See Mother's Declaration; Counsel's Declaration.)

Furthermore, mother did not just "forget about it." (MBM 47.) As set forth in trial counsel's declaration, *mother continued to communicate with a social worker from trial counsel's office after the June 17, 2019 hearing*. (Counsel's Declaration, emphasis added.) In fact, it was mother's continued contact with her trial attorney's office during the sixty-days following the order terminating her parental rights that alerted trial counsel to her mistake. (Counsel's Declaration.) It was on August 14, 2019, when counsel was looking at mother's file and responding to an email from her office social worker, that she realized she had filed to timely file the notice of appeal as intended. (Counsel's Declaration.)

Blame for the failures of court-appointed counsel should not be shifted to the parents in juvenile dependency proceedings. To

do so, would upend a legal system that requires an attorney to "perform legal services with competence" (CA Rules of Prof. Responsibility, rule 1.1) and that expects "reasonable diligence in representing a client" which include a lawyer acting with "commitment and dedication to the interests of the client and does not neglect or disregard, or *unduly delay a legal matter entrusted to the lawyer*." (CA Rules of Prof. Responsibility, rule 1.3 (a) and (b), emphasis added.)

Minor's claim that "appellant's interests were protected and promoted throughout the dependency process *up until her time to appeal expired*," completely overlooks that mother's right to appeal was not protected during those sixty days. (MBM 50, emphasis added.) If mother's interests had been protected and promoted as required, the notice of appeal would have been filed in a timely manner.

Mother cannot be blamed for her court-appointed attorney's failure to provide competent representation.

CONCLUSION

The United States Supreme Court has recognized that in dependency cases a "state's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense." (*Santosky v. Kramer* (1982) 455 U.S. 745, 763.) Given this unavoidable inequity, the parent, minor, and state share a joint interest in ensuring the accuracy of the order terminating parental rights on a full and fair adjudication, which includes appellate review of the juvenile court's decision. "[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." [citations omitted] (*Lois R. v. Superior Court* (1971) 19 Cal.App.3d 895, 902.)

The value of quality representation in juvenile dependency proceedings is essential. Representation of parents

> requires navigating complex problems such as poverty, language barriers, criminal proceedings, substance abuse, mental illness and homelessness [citations omitted]. Caseloads are big, hours are long, and respect for parent representation has traditionally been low. However, this is changing as recent years have brought greater recognition of the importance of this area of the law and *the value of quality representation.*

(Seiser &Kumli, Cal. Juv. Cts. Prac. & Proc. (2020) § 2.61[1][b], p. 2-188, emphasis added.)

"[N]o matter how long one had been representing parents in dependency proceedings, it is hard to become desensitized to the words: 'parental rights are hereby terminated.' These words reflect what is at stake in child welfare proceedings, and

consequently, the vital importance of quality legal representation of parents." (Seiser &Kumli, Cal. Juv. Cts. Prac. & Proc. (2020) § 2.61[1][b], p. 2-188.)

Parents in juvenile dependency proceedings should not be denied equal access to justice due to the fault of their court-appointed counsel, especially when the termination of their parental rights is at stake.

Dated: September 18, 2020

Respectfully submitted,

JONATHAN SOGLIN
Executive Director

/s/ Louise E. Collari

LOUISE E. COLLARI
Staff Attorney

Attorneys for Appellant

CERTIFICATE OF WORD COUNT

Counsel for mother, M.B., hereby certifies that this brief consists of **5,762** words (excluding cover page information, tables, proof of service, signature blocks, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 8.520(c).)

Dated: September 18, 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 18, 2020, we served a true copy of the **Appellant's Response to Minor's 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.

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Alameda County Social Services Agency
(occappeals.eservice@acgov.org)
(Respondent)

Alicia Park
(Minor's Trial Counsel)
(parklaw@mindspring.com)

Court of Appeal, First Appellate District

Anna Stuart
(Minor's Appellate Counsel)
(anna@sdap.org)

Rita Rodriguez
East Bay Family Defenders
(Mother's Trial Counsel)
(rita@familydefender.org)

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 18, 2020, at Oakland and El Cerrito, California.

/s/ Elizabeth Wilkie
Elizabeth Wilkie
Declarant for Postal Delivery

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STATE OF CALIFORNIA
Supreme Court of California

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/18/2020
Date

/s/B Palmer

Signature

Collari, Louise (156244)

Last Name, First Name (PNum)

First District Appellate Project

Law Firm