IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

S260928

(Court of Appeal No. A158143)

Alameda Superior Court No. JD-028398-02

MINOR'S REPLY BRIEF ON THE MERITS

After the Unpublished Order by the First District Court of Appeal, Division One, Filed on January 21, 2020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

SIXTH DISTRICT APPELLATE PROGRAM
ANNA L. STUART, Esq.
Staff Attorney
State Bar #305007
95 S. Market Street, Suite 570
San Jose, CA 95113
(408) 241-6171-phone
(408) 241-2877-fax
anna@sdap.org

Attorney for Overview Party,
A.R.

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (CONTINUED)

CONSTITUTIONS

STATUTES

MISCELLANEOUS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

MINOR'S REPLY BRIEF ON THE MERITS

INTRODUCTION

From the briefing filed in this case thus far, the following can be gleaned as the principal points of law, argument, and dispute. Historically, the right to challenge the ineffective assistance of counsel for the failure to file a timely notice of appeal following the termination of parental rights has been precluded without exception for reasons of sound public policy and the minors' interests in stability and permanency. (OBM 45-46; RB 22-25; MB 40-43; see *In re A.M.* (1989) 216 Cal.App.3d 319, 322; *In re Isaac J.* (1992) 4 Cal.App.4th 525, 532; *In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254; see MB 40-43.)[1] This case

[1] With the goal of clarity and ease of reference, Minor will refer to the other briefs filed to date in this case as follows: (1) Appellant's Opening Brief on the Merits: "OBM"; (2) Respondent's

comes before the Court to decide whether such preclusion should continue.

Following the dismissal of her appeal for failure to file a timely notice of appeal, Appellant argues that "fairness and justice" and the "derivative accuracy interest" require that her untimely notice be considered constructively filed within the jurisdictional time limit to appeal. (ARMB 8.) In Appellant's view, a parent must be permitted constructive filing of a notice of appeal if their trial counsel's failure to timely file the notice of appeal occurred despite the parents' request that counsel file a notice of appeal on their behalf during the 60-day appeal window. (ARMB 8.) Appellant argues that the constructive filing doctrine should apply to dependency cases without limitation.

Appellant contends that the constructive filing doctrine does not constitute an extension of the jurisdictional time limit for filing a notice of appeal nor constitute a collateral attack. (ARMB 9-12, 18-19.) Further, Appellant argues that the right to raise a claim of ineffective assistance of counsel within the dependency scheme is unlimited and thus necessarily includes the right to claim, post-finality, that a parent's trial attorney did not timely file a notice of appeal on request. (ARMB 22-25.) Finally, Appellant believes that she met the requisite showing under the constructive filing doctrine to be granted relief from

---

Answer Brief on the Merits: "ABM"; (3) Minor's Opening Brief on the Merits: "MB"; (4) Appellant's Reply Brief on the Merits: "RBM"; (5) Respondent's Reply to Minor's Brief: "RRMB"; and (6) Appellant's Reply to Minor's Brief: "ARMB."

default. (ARMB 25-28.)

Respondent and Minor disagree in totality. During the reunification period, the weight of the parents' rights is significant while the juvenile court's focus is on family preservation. But following the termination of parental rights, the focus shifts to the provision of permanence and stability for the minor child. Once parental rights are terminated and the 60-day window to appeal the judgment has passed, public policy and the minor's right to due process preclude a claim of ineffective assistance of counsel for actions taken or not taken concerning a notice of appeal. (See MB 12-35; RRMB 21-39.)

This Court should hold that a parent does not have the right to challenge her attorney's failure to file a timely notice of appeal following the termination of parental rights.

ARGUMENT

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

In Minor's Opening Brief on the Merits, she demonstrated that compliance with the jurisdictional requirement for a timely notice of appeal is mandatory, and that by statute and precedent a claim of ineffective assistance of counsel cannot undo a final non-modifiable termination order. (See MB 12.-17.) Minor also showed how the balance of the interests under state law and principles of due process prioritizes the Minors' rights to permanence and stability once the 61st day passes without a filed

notice of appeal. (MB 31-35.)

In reply, Appellant makes the following assertions: (1) the constructive filing doctrine does not extend the jurisdictional requirement to file a notice of appeal and is not a collateral attack; (2) the doctrine has been extended to parents in dependency; (3) this Court must limit its focus solely to the 60-day period following the termination order; and (4) the right to claim ineffective assistance of counsel in the dependency context is unlimited. None are persuasive.

A. The constructive filing doctrine is a legal fiction that - *in fact* -- extends the jurisdictional requirement to file a notice of appeal.

Appellant is unequivocal, her request for expansion of the constructive filing doctrine does not "extend the time to appeal." (ARMB 9-10.) At the same time, Appellant acknowledges in a footnote, that the constructive filing doctrine is a "legal fiction." (ARMB 10, fn. 2.) As this Court has explained, however, "the principle of constructive filing . . . embodies nothing more than a basis for judicial acceptance of an excuse for the appellant's delay in order to do justice." (*In re Benoit* (1973) 10 Cal.3d 72, 84.) It is unquestionably a "legal fiction." (See e.g., *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 677 (dis. opn of. Tobriner J. [describing the *Benoit* holding in terms of "disguising a doctrine of reasonable reliance under the legal fiction of constructive filing"].)

Minor does not dispute that courts in criminal and prison cases have found that the constructive filing doctrine does not extend jurisdictional requirements but instead "redefine[s] the point at which notice is deemed filed." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 121, 128; ARB 9.) But while the constructive filing doctrine creates a procedural fiction to get around jurisdiction, it is undisputed that it actually delays the appeal. This is why the application of the doctrine to post-termination dependency proceedings must be precluded. Application of the constructive filing doctrine is appropriate "in order to do justice." (*Benoit*, *supra*, 10 Cal.2d at p. 84.) The delays caused by constructive filing outside of the termination context do not directly harm a party to the action. But in the dependency context, the minor, state, and adoptive parents are harmed by the actual delay caused by constructive filing. Such a consequence cuts against the purpose of the dependency scheme, which is to protect and promote the welfare of children.

Thus, while the court can simply ignore the actual delay in the criminal context, they cannot do the same in the dependency context. Appellant's bare assertion that the constructive filing doctrine "can be applied to juvenile dependency without affecting a child's need for finality" is illogical and completely ignores that the constructive filing doctrine actually delays finality. (ARMB 10.)

Moreover, Appellant's concept of "justice" is too heavily skewed toward the parents' position. "The Legislature has defined the best interests of children in dependency proceedings along a

statutory continuum." (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1787.) "Family preservation, with the attendant reunification plan and reunification services, is the first priority when child dependency proceedings are commenced." (*Ibid*.) Accordingly, a parent's rights are at their highest at the pre-termination stages. (See *In re Arturo A.* (1992) 8 Cal.App.4th 229, 238.) But once reunification services are terminated, the parents' rights are relegated and the focus changes "to provide the dependent children with stable, permanent homes." (*Elizabeth R.*, *supra*, 35 Cal.App.4th at p. 1787, citing *In re Michael R.* (1992) 5 Cal.App.4th 687, 695-696.) By that stage, the parent has been shown to be unfit and unable to have their child returned. Generally, the only remaining question is what the child's permanent plan should be. Indeed, once reunification services are terminated, the later decision at the permanency hearing to terminate parental rights "will be relatively automatic." (*Arturo A.*, *supra*, 8 Cal.App.4th at p. 239.) If, as here, adoption is selected, it is important that there be no further undue delay in its finalization.

Under state and federal law, it is the minor's interests that are championed over the parents' at this juncture; justice can best be served by precluding application of the constructive filing doctrine following the termination of parental rights. (See MB 19-35.)

B. Constructive filing constitutes a collateral attack on a final non-modifiable order terminating parental rights.

In her brief on the merits, Minor explained how precedent and policy prevent application of the constructive filing doctrine in the situation at bar because collateral attacks are precluded. (MB 13-18.) Appellant unequivocally states that the constructive filing doctrine "is not a collateral attack on an order terminating parental rights." (ARMB 8). With respect, Appellant is not correct. (See *Wall v. Kholi* (2011) 562 U.S. 545, 551-553; see also 8 Witkin, Cal. Proc. (2008) Attack on Judgment in Trial Court, § 1, p. 583.)

In contrast to a collateral attack, a "direct" challenge is "described as a proceeding instituted for the specific purpose of vacating, reversing, or otherwise attacking the judgment." (8 Witkin, Cal Proc., supra, § 1, p. 583.) A "collateral attack," on the other hand, is " '[a]n attack on a judgment in a proceeding other than a direct appeal.' " (*Wall v. Kholi*, *supra*, 562 U.S. at pp. 551-552, citing to Black's Law Dict.) "The significance of the distinction between direct attack and collateral attack [Citation] is this: If a judgment, no matter how erroneous, is within the jurisdiction of the court, it can only be reviewed and corrected" by direct attack. (8 Witkin, Cal Proc., supra, § 1, p. 583.) Under these principles, collateral proceedings are judicial proceedings "other than a direct appeal." (*Wall v. Kholi*, *supra*, 562 U.S. at pp. 551-552.) That is exactly the posture of the case at bar.

To initiate a direct appeal in this case required the timely filing of a notice of appeal to vest jurisdiction in the Court of Appeal. (See *Estate of Hanley* (1943) 23 Cal.2d 120, 123.) Such a timely filing would have allowed Appellant to directly challenge the propriety of the termination order issued below. (See 8 Witkin, Cal Proc., supra, § 1, p. 583.) But instead, this case comes before this Court following the dismissal of the direct appeal, for want of appellate court jurisdiction, and as a result of a review petition that followed that dismissal.[2] Accordingly, this action does not constitute a direct appeal on the judgment terminating parental rights. Because it is a proceeding "other than" a direct attack, it is thus a collateral attack. *(Wall v. Kholi*, *supra*, 562 U.S. at pp. 551-552.)

The difficulty for Appellant is that collateral attacks on termination orders are precluded. (See e.g. *Ex Parte Miller* (1895) 109 Cal.643, 646.647; see also *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 868.) Appellant's attempts to characterize the constructive filing procedure as non-collateral to the direct appeal must fail.

---

[2] See the online docket for the First District Court of Appeal in case number A158143.

C. The constructive filing doctrine has not been extended to a final judgment terminating parental rights.

In her opening brief, Minor demonstrated that there has been no extension of the constructive filing doctrine to dependency law. (MB 36-35.) Appellant responds by claiming Minor ignored the "multiple situations" where the Rules of Court permit late-filed notices of appeal. (ARMB 10.) Minor agrees that the Rules of Court permits such late-filing, but these rules do not permit a claim of ineffective assistance of counsel for the failure to timely file the notice of appeal following the termination of parental rights.

For example, the "other procedures" allowing a late filing include incarcerated parents (Cal. Rules of Court, rule 8.25(b)(5) [prison delivery rule]), acts by referees who are supervised by judges to avoid confusion as to when finality has occurred (Cal. Rules of Court, rule 8.406(a)(2)(3)), and the failure to advise parents of appellate rights in a pre-termination case that the Welfare and Institutions Code section 366.26 permanency hearing has been set.[3] (Cal. Rules of Court, rules 5.725(h) & 5.590). (ARMB 11-12.) But as is plain, none of these examples cited by Appellant have any connection to a final order following termination of parental rights where, as here, the parent is not incarcerated. Just because some scenarios permit late-filed

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

notices of appeal does not justify its use for all reasons.

In sum, the sixty-day rule is jurisdictional. (*Hollister Convalescent Hosp., Inc. v. Rico*, *supra*, 15 Cal.3d at pp. 666-670.) Although constructive filing has been called a "legal fiction," it *in fact* extends the time it takes for the notice of appeal to be filed beyond the 60-day jurisdictional window.

D. The relevant focus is the minor.

The problem with the "legal fiction" of constructive filing following the termination of parental rights, is that any delay – even as little as one day – harms other parties in the litigation, namely, the minor.

Appellant attempts to avoid this problem by arguing that the relevant "focus must be on the actions that mother and her court-appointed counsel took within the sixty days to file a notice of appeal." (ARMB 8.) This attempt to redirect the issue on appeal must not succeed. By focusing solely on those 60 days post-judgment, this Court would have to ignore the prevailing rights of the minor and the legal precedent which makes clear that a post-final ineffective assistance of counsel challenge is untenable in this circumstance.

Appellant argues that "it is improbable" an adoption could be finalized on day 61 post-judgment. (ARMB 20.) Maybe so. But there is no limit to when the constructive filing doctrine of *Benoit* can be applied post-finality. (See *People v. Zarazua* (2009) 179 Cal.App.4th 1054 [*Benoit* granted after 5 month delay].) What happens if a parent files a *Benoit* motion five months or more

after the 60 day window? Appellant simply ignores this possibility, but her argument is necessarily that the adoption process should stop and the parent's late appeal should go forward. Such an outcome would not "do justice" to the minor, who is the critical party in the process. (See *Benoit*, supra, 10 Cal.3d at p. 84.)

E. The right to counsel in dependency law is limited and precludes a post-finality challenge on ineffective assistance grounds.

Minor argued in her opening brief that the right to counsel under state law and principles of due process is limited to preclude a challenge to a late-filed notice of appeal following the termination of parental rights. (MB 20-23; see *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1661-1662, 1667; see also *Arturo A.*, *supra*, 8 Cal.App.4th at p. 838.) Minor showed that the scope of the right to counsel under state dependency law and due process requires weighing the parties' interests, and that the minor's interests prevail under this analysis. (MB 22-33.) Appellant disagrees that the right to counsel is limited. (ARMB 22-25.) Minor maintains that there is a limitation and it resolves the issue at bar.

In support of her claim, Appellant argues that, "[t]he difference in the origin of the right to effective assistance of counsel is irrelevant." (ARMB 13.) Far from it. The difference in origin is a critical factor.

Under the Sixth Amendment, criminal defendants have the

right to be represented by counsel at all critical stages of a criminal prosecution. (*People v. Marshall* (1997) 15 Cal.4th 1, 20.) There is no such express constitutional right in termination cases where the resolution of whether there is a right to counsel at all is made on a case-by-case basis. (See *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 31-32 [whether a parent is entitled to appointed counsel under the Due Process Clause of the Fourteenth Amendment is determined on a case-by-case basis following the *Mathews v. Eldridge* (1976) 424 U.S. 319, balancing test].)

Parents are thus not guaranteed the constitutional right to counsel in dependency termination proceedings. (*Lassiter*, *supra*, 452 U.S. at pp. 31-32) Whatever due process right to counsel that exists, it does not extend to the ability to excuse a late-filed notice of appeal due to the failure of parents' trial counsel after parental rights have been terminated. (See MB 19-35.) In contrast, the plenary nature of the right to counsel under the Sixth Amendment permits constructive filing based on claims of ineffective assistance of counsel. (See e.g.*, Roe v. Flores-Ortega* (2000) 528 U.S. 470, 483; see also *People v. Diehl* (1964) 62 Cal.2d 114, 118.) But the same is not true for dependency where the parties' respective interests must be weighed.

Given the nature of the dependency scheme, the scope of the parent's state law right to competent counsel is also dependent on balancing the parties' interests. (See *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [the "dependency scheme, when viewed as a whole, provides the parent due process and

fundamental fairness while also accommodating the child's right to stability and permanency"].) As with the due process analysis, the minor's rights similarly override the parents'. Accordingly, although it is Appellant's position that the right to counsel in dependency is unlimited, Appellant ignores that the appropriate limits already in place is the reason we are before this Court today.

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

Appellant advocates for a noticed motion approach to application of the constructive filing doctrine. (OBM 62-66.) Respondent takes the position that a habeas petition is the proper procedure to raise a claim of ineffective assistance of counsel post-finality. (RBM 39-50.) Although taking no position on the mechanism should this Court permit relief from default, Minor continues to urge this Court to be cognizant of the relevant public policy and the minors' due process rights were it to fashion one. (See MB 36-50.) In this regard, and in agreement with Respondent, Minor maintains that the proper procedure requires a heightened showing under *Benoit*. (MB 45-49; RBM 39-50.) In contrast, Appellant thinks that *Benoit* should be adopted wholesale in dependency. Whatever this Court decides, Appellant is not entitled to constructive filing even under the basic *Benoit* standard.

A. Appellant cannot show due diligence or justifiable reliance even under a non-heightened *Benoit* standard.

In order to demonstrate eligibility for constructive filing under a non-heightened *Benoit* standard, the applicant must show justifiable reliance on their attorney's promise to file the notice of appeal, due diligence in assuring herself that a notice was being timely filed, and that counsel was ineffective for failing to timely file the notice. (*Benoit*, *supra*, 10 Cal.3d at pp. 86-89.) *Benoit* applies, however, only when there is evidence the defendant actually relied on trial counsel's promise to file a notice of appeal and sought assurances that the notice would be filed. (See *Zarazua*, *supra*, 179 Cal.App.4th at p. 1061 [*Benoit* applies when "trial counsel neglects to fulfill the promise to file a timely notice of appeal"]; see also *In re Chavez* (2003) 30 Cal.4th 643, 653 [there is an implicit requirement to seek and receive assurances under *Benoit*].)

In *Chavez*, this Court clarified the *Benoit* holding stating, "[i]n *Benoit*, we applied the doctrine of constructive filing based upon a promise or representation made by each defendant's attorney that he would timely file a notice of appeal on his client's behalf." (*Chavez*, *supra*, 30 Cal.4th at p. 653.) Implicit in this conclusion is that the constructive filing doctrine does not apply where the "defendant did not seek and did not receive any assurances from [their] … trial counsel that counsel would prepare or file" a notice of appeal. (*Ibid.*; see also *In re Antilia* (2009) 176 Cal.App.4th 622, 631 [*Benoit* applies when there is

evidence that "defendant relied on counsel's promise to file a notice of appeal"]; see also *People v. Riley* (1977) 73 Cal.App.3d Supp. 1, 4 [same]; see also *People v. Aguilar* (2003) 112 Cal.App.4th 111, 116 [declining to apply *Benoit* where there was no agreement or diligent attempt to ensure the attorney carried out the responsibility].)

Appellant's Application for Relief from Default ("Application") filed in this case does not establish justifiable reliance or due diligence under *Benoit*. In Appellant's declaration attached to the Application she avers that she was unable to directly reach her "assigned attorney" prior to the section 366.26 hearing because her assigned attorney was in the process of quitting her job . . . ." (Decl. M.B., ¶ 5.) Instead, Appellant spoke with "a supervising attorney, Rita Rodriguez" about her inability to attend the termination hearing. (Decl. M.B., ¶ 4.) "Soon after the hearing," Appellant "contacted [her] social worker" at her attorney's office for an update about her case. (Decl. M.B., ¶ 6.) The social worker told her that her "parental rights had been terminated and that [she] had a right to appeal the decision." (Decl. M.B., ¶ 6.) Mother then ambiguously "informed her attorney that [she] wished to appeal the decision." (Decl. M.B., ¶ 6.)

In Ms. Rodriguez' declaration attached to the Application, she states that between "September 1, 2018 to May 30, 2019, [she] supervised Maria Dominguez while she represented [M.B.]." (Decl. Rodriguez, ¶ 2.) Ms. Rodriguez also stated that she "represented the Appellant [M.B.] . . . from May 30, 2019 to June

12, 2019," which included "appear[ing] as counsel for [M.B.] at the section 388 and section 366.26 hearing." (Decl. Rodriguez, ¶ 3.) As to the post-termination hearing events, Mr. Rodriguez averred that she "learned that [M.B.] wished to file a notice of appeal on June 17, 2019," that "[a]lthough it [was] usually [her] practice to file a notice of appeal within one or two days of learning of a client's desire to appeal, in this instance [she] forgot to do so." (Decl. Rodriguez, ¶ 4 & 5.) Finally, Ms. Rodriguez explained, "[i]t was not until August 14, 2019, when [she] was looking at [M.B.'s] case file and responding to an e-mail from [the] office social worker that [she] realized [she] had not in fact filed the notice of appeal for [M.B.]." (Decl. Rodriguez, ¶ 6.)

These declarations provide no evidence that Appellant asked her attorney *to file* the notice of appeal for her. Instead, there is only evidence that she "informed [her] attorney that [she] wished to appeal . . ." (Decl. M.B., ¶ 6.) There is also no evidence that Appellant sought an assurance from her trial attorney that she would be the one who filed the notice of appeal. Indeed, there was no evidence of any direct communication or agreement as to whom or how the notice of appeal would be filed. While there is evidence that "a social worker" at the attorney's office "continued to support [M.B.] and communicate with her after the closure of her case," there is no indication of what was being discussed. (Decl. Rodriguez, ¶ 6.) One would have to speculate to conclude that Appellant and her social worker discussed the filing of the notice of appeal as opposed to other matters relating to perhaps the adoption or visitation with A.R. (See *In re Savannah M.*

(2005) 131 Cal.App.4th 1387, 1393-1394 [substantial evidence cannot be based on "speculation or conjecture"].) Essentially, upon learning that she had the right to appeal, Appellant simply stated that she wished to appeal without asking her trial attorney to do so on her behalf.

More importantly, there is no evidence that Appellant's trial counsel promised, assured, or even communicated to Appellant that she would file the notice of appeal for her thus precluding any argument that Appellant detrimentally relied on such a promise. (See *Chavez*, *supra*, 30 Cal.4th at p. 653.) Indeed, there is an open question as to who was representing Appellant after June 12, 2019, and thus to whom M.B. "informed" of her desire to appeal. (See Decl. Rodriguez, ¶ 3.) Rather than describing any agreement or conversation, Ms. Rodriguez declared that she had planned to file the notice of appeal for Appellant solely because it was her general practice to do so, not because she had actually made any promises or assurances to Appellant that she would. (See Decl. Rodriguez, ¶ 5.)

In sum, Appellant learned that she had the right to appeal and ambiguously declared that she wanted to appeal her case. Appellant "did not seek and did not receive any assurances" from her trial counsel that counsel would file a notice of appeal on her behalf. (*Chavez*, *supra*, 30 Cal.4th at p. 653.) Notably, there is no evidence that Appellant and her attorney spoke at any point after the termination hearing. Thus, even if the existing *Benoit* standards from criminal law apply in the dependency context, Appellant does not satisfy them in this case.

B. Application of the constructive filing doctrine to the termination of parental rights requires a heightened showing of justifiable reliance, due diligence, and prejudice.

For the reasons described in Minor's Opening Brief on the Merits, a heightened showing under *Benoit* is necessary if the constructive filing doctrine is expanded to dependency. (MB 45-49.) The fundamental differences between criminal law and dependency law, the public policy focus on child welfare, and the overriding due process interests of the minor mean that a more robust showing is necessary before a parent can raise a claim of counsel's ineffectiveness following the termination of parental rights. (See MB 45-49; see *Isaac J.*, *supra*, 4 Cal.App.4th at pp. 536-543, dis. opn. of Timlin J. [describing a heightened standard of *Benoit* in dependency].)

By way of example to explain why a heightened standard is appropriate, were this Court to permit a limited mechanism for relief from default, a final question emerges: where is the line? In her briefs to date, Appellant offers no limitation on the use of constructive filing in the dependency context. In light of public policy and the minor's due process rights following termination of parental rights, this is untenable. A showing of due diligence at this stage rights must address the notion of timeliness. In criminal law, there is precedent for the granting of a relief from default motion some five months after the judgment. (See *Zarazua*, *supra*, 179 Cal.App.4th 1054 [*Benoit* granted after five month delay].) Although in this case, the notice of appeal was

filed three days late, and not five months, Appellant seeks a wholesale transfer of the *Benoit* constructive filing doctrine to dependency law at the termination of parental rights stage. If this Court agrees, there has to be a time limit to minimize the dangers of delay for the sake of the minors. The window of opportunity must be narrow. Every day that passes following a final order terminating parental rights harms the child's right to permanence and stability.

As described above in Part II-A, Appellant does not meet even a minimal showing under *Benoit*. Thus, whatever this Court decides regarding the nature of a parent's ability to seek relief from an untimely notice of appeal, the Court of Appeal's decision to dismiss Appellant's appeal in this case is the appropriate outcome. Appellant is not entitled to constructive filing of her notice of appeal under any standard.

CONCLUSION

All parties agree that fairness is the relevant principle. (OBM 16-17, 27; ABM 31-31; 36-37; MB 10, 19-20.) A "closed door" policy would only be unfair to a parent if the weight of their interests in relation to the minor were at least equal. By the time parental rights are terminated, however, the parent has been afforded appropriate constitutional and statutory protection and their rights must be relegated to those of the minor. On day 61 post-judgment, public policy and the minor's due process right to a permanent and stable home prevails over a parents' right to appeal, a parents' right to challenge their counsel's

ineffectiveness, and the derivative interest in the judgment's accuracy.

Out of concern for minors like A.R., Minor respectfully requests that this Court affirm the order dismissing Appellant's appeal.

Dated: October 8, 2020

Respectfully submitted

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

CERTIFICATE OF WORD COUNT

I hereby certify that according to the word count function on the software utilized by my computer, ***MINOR'S REPLY BRIEF ON THE MERITS*** contains 4558 words.

Dated: October 8, 2020

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

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

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

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

X **BY ELECTRONIC TRANSMISSION** - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

Served electronically via TrueFiling.com:

Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

Anna L. Stuart, Staff Attorney
Sixth District Appellate Prog.
anna@sdap.org
servesdap@sdap.org

Alicia Park
parklaw@mindspring.com
Trial counsel for OverviewParty A.R.

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

Rita Rodriguez
East Bay Family Defenders
rita@familydefender.org
Trial counsel for Appellant M.B.

Samantha N. Stonework-Hand
samantha.stonework-hand@acgov.org
Office of the County Counsel
County of Alameda

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

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

I declare under penalty of perjury the foregoing is true and correct. Executed this 8th day of October, 2020, at San Jose, California.

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

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **IN RE A.R.**
Case Number: **S260928**
Lower Court Case Number: **A158143**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **anna@sdap.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S260928_MINORSRPLY_A

Service Recipients:

Person Served	Email Address	Type	Date / Time
Alicia Park Alicia C. Park, Attorney at Law 165622	parklaw@mindspring.com	e-Serve	10/8/2020 12:59:37 PM
Sixth Sixth District Appellate Program Court Added	servesdap@sdap.org	e-Serve	10/8/2020 12:59:37 PM
Samantha Stonework-Hand Office of the Alameda County Counsel 245788	samantha.stonework-hand@acgov.org	e-Serve	10/8/2020 12:59:37 PM
Appellate Defenders Appellate Defenders, Inc.	eservice-court@adi-sandiego.com	e-Serve	10/8/2020 12:59:37 PM
Anna Stuart Sixth District Appellate Program 305007	anna@sdap.org	e-Serve	10/8/2020 12:59:37 PM
Alameda County Social Services Agency	occappeals.eservice@acgov.org	e-Serve	10/8/2020 12:59:37 PM
Rita Rodriguez 269281	rita@familydefender.org	e-Serve	10/8/2020 12:59:37 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

10/8/2020
Date

/s/Priscilla O'Harra
Signature

Stuart, Anna (305007)
Last Name, First Name (PNum)

Sixth District Appellate Program
Law Firm