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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 26, 2012

Title
Appellate Procedure: Premature or Late Notice of Intent to File a Writ Petition in a Juvenile Dependency Proceeding

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 8.450

Recommended by
Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair

Family and Juvenile Law Advisory Committee
Hon. Kimberly J. Nystrom-Geist, Cochair
Hon. Dean Stout, Cochair

Agenda Item Type
Action Required

Effective Date
January 1, 2013

Date of Report
August 15, 2012

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Audrey Fancy, 415-865-7706
audrey.fancy@jud.ca.gov

Executive Summary

The Appellate Advisory Committee and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council amend rule 8.450 to (1) fill a gap in the rules by specifying what happens if a notice of intent to file a writ petition to review an order setting a hearing under Welfare and Institutions Code section 366.26 is filed too early or too late, and (2) save trial courts costs associated with unnecessarily sending notices and preparing records when such notices are filed prematurely.

Recommendation

The Appellate Advisory Committee and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council, effective January 1, 2013:

1. Amend rule 8.450 of the California Rules of Court to add a provision requiring that if a notice of intent to file a writ petition under Welfare and Institutions Code section 366.26 is filed prematurely (i.e., before an order setting a hearing under section 366.26 has been made) or filed late:
    a. The notice must be marked "received [*date*] but not filed;"
    b. The marked notice must be returned to the filing party with a notice indicating that it was not filed because it was premature or late and that the party should contact his or her attorney as soon as possible to discuss the notice; and
    c. A copy of the marked notice of intent and clerk's notice must be sent to the party's attorney, if applicable; and
2. Further amend rule 8.450 to correct an erroneous cross-reference; and
3. Add provisions to the advisory committee comment accompanying rule 8.450 indicating that:
    a. It may constitute good cause for an extension of time to file a notice of intent if a premature notice of intent is returned to a party shortly before an order setting a hearing under Welfare and Institutions Code section 366.26 is made; and
    b. A party who prematurely attempts to file a notice of intent to file a writ petition under Welfare and Institutions Code section 366.26 is not precluded from later filing such a notice after an order setting a section 366.26 hearing is made.

The text of the proposed rule is attached at pages 10–12.

Previous Council Action

Effective January 1995, in compliance with a statutory mandate, the Judicial Council adopted the predecessor to rule 8.450, rule 39.1B, regarding writ petitions to review orders setting a hearing under Welfare and Institutions Code section 366.26. On January 1, 2005, all the rules relating to juvenile appeals were repealed and replaced with new rules; the provisions of rule 39.1B that related to notices of intent to file writ petitions were moved into rule 38. Also effective January 1, 2005, in compliance with a statutory mandate, the Judicial Council adopted the predecessor to rule 8.454, rule 38.2, regarding notices of intent to file writ petitions under Welfare and Institutions Code section 366.28. Effective January 1, 2006, rule 38.2 was amended to include a provision addressing premature and late notices of intent to file writ petitions. Effective January 1, 2007, rule 38 was renumbered as rule 8.450, and rule 38.2 as rule 8.454.

Rationale for Recommendation

Background

There are typically many stages in juvenile dependency proceedings from the filing of a petition by the Department of Social Services to the potential termination of parental rights and permanent placement of the child. At two stages in these proceedings—when the court issues an

order setting the hearing at which parental rights may be terminated and when the court issues an order designating the specific placement of a child after termination of parental rights—the Legislature has provided for review by way of writ petition rather than appeal.

Before these writ procedures were established, a party might file an appeal of a ruling that terminated parental rights or designated the specific placement of a child after termination of parental rights. By the time these appeals were decided, the child who was the subject of the dependency proceeding had often been in what was thought to be a permanent placement for quite some time. If the court reversed the termination of parental rights or the child's placement, this could be very disruptive for the child. The goal of these writ procedures is to minimize the potential disruption for the child by addressing challenges to the relevant court orders as quickly as possible. Thus, the time frames for these writ proceedings are very short. Among other things, a party must generally file a notice of intent to file one of these writ petitions within seven days after the juvenile court issues the order being challenged, and when such a notice of intent is filed, the superior court clerk must immediately send copies of the notice to the reviewing court and other parties, instruct court reporters to begin preparing the reporter's transcript, and begin preparing the clerk's transcript.

Rule 8.454 of the California Rules of Court addresses notices of intent to file a writ petition under Welfare and Institutions Code section 366.28 challenging an order designating specific placement of a dependent child after termination of parental rights. Rule 8.454(f) addresses what happens if such a notice of intent is filed prematurely (i.e., before the court actually issues the order designating a specific placement) or filed late. If a notice of intent under rule 8.454 is premature, the rule provides that a reviewing court may treat the notice as if it were filed immediately after issuance of the order designating specific placement of a dependent child. If a notice of intent under rule 8.454 is filed late, the rule requires the superior court clerk to mark the notice "Received [*date*] but not filed," notify the party that the notice was not filed because it was late, and send a copy of the marked notice to the party's counsel of record, if applicable.

Rule 8.450 addresses notices of intent to file a writ petition under Welfare and Institutions Code section 366.26 challenging an order setting a hearing to consider possible termination of parental rights. Unlike rule 8.454, however, rule 8.450 does not currently address what happens if such a notice of intent is filed prematurely (i.e., before the court actually issues the order setting the section 366.26 hearing) or filed late.

Proposed amendments to rule 8.450

The amendments to rule 8.450 proposed in this report are based on suggestions received from the California Appellate Court Clerks Association and a Court of Appeal staff attorney. These proposed amendments are intended to (1) fill the gap in rule 8.450 by amending it to add provisions addressing premature and late notices of intent; (2) provide significant cost savings and efficiencies for trial courts when such notices of intent are filed prematurely by eliminating unnecessary preparation of records and notifications of the reviewing court and other parties; and (3) correct an erroneous cross-reference to rule 8.404.

Late notices of intent. The language regarding late notices of intent in proposed new subdivision (f) of rule 8.450 is modeled on rule 8.454(f)(2). This subdivision will require superior court clerks to mark a late notice of intent "Received [date] but not filed," return the marked notice to the party, notify the party that it was not filed because it was late, and send a copy of the marked notice to the party's counsel of record, if applicable.

Premature notices of intent. The proposed language regarding premature notices of intent under rule 8.450 is not modeled on rule 8.454(f)(1). Instead, under this proposed language, premature notices of intent under rule 8.450 will be treated similar to late notices of intent—the superior court clerk will mark the premature notice as received but not filed and return it to the party with a notice to the party and his or her counsel that it was not filed because it was premature.

The committees concluded that this approach was preferable for such premature notices of intent for a variety of reasons. It is the committees' understanding that premature notices of intent under rule 8.450 are typically filed by parents of children who are the subject of dependency proceedings. Although these parents are represented in the dependency proceedings, they still may file such notices of intent on their own. At the stage of the juvenile proceedings at which the juvenile court might set a hearing under section 366.26—at which point a notice of intent under rule 8.450 could properly be filed—there are also many other orders that the juvenile court might make. The fact that many different orders may be issued at this stage of the juvenile proceedings increases the likelihood of a parent's mistakenly filing a notice of intent under rule 8.450 when no order setting a hearing under section 366.26 was made, either because the parent has confused one of these other orders for an order setting a hearing under section 366.26, or conversely, because the parent actually meant to challenge a different order made by the court.

When such a notice of intent is filed, it triggers the superior court clerk's duties to notify the reviewing court and other parties and to begin preparing the record. Depending on the circumstances, such notification and record preparation may be premature or completely unnecessary. In some cases, the juvenile court may never issue an order setting a hearing under Welfare and Institutions Code section 366.26 at all. If a parent was only interested in challenging a section 366.26 hearing order and no such order is ever made, sending notifications and preparing a record is unnecessary. In other cases, the juvenile court may not issue such a section 366.26 order until it holds a review/permanency hearing in the case 6, 12, or 18 months later. In such circumstances, if a record is prepared at the time a notice of intent is prematurely filed, the record will later need to be augmented to include the actual proceedings at which the section 366.26 order was made, which may cause delay. By making it clearer that premature notices of intent under rule 8.450 should not be filed, this proposal is intended to save trial courts the costs associated with the premature and potentially unnecessary sending of notices to other parties and preparing of records in these proceedings.

As noted above, in some cases in which no section 366.26 hearing has been ordered, parents may have mistakenly filed a notice of intent when they instead wished to challenge a different order made by the court. Some orders that a court may make at this stage in juvenile proceedings, such

as an order terminating reunification services for one parent but not the other, are immediately appealable. The committees understand that some reviewing courts, to protect the parents' right to appeal in these circumstances, have construed some such mistakenly filed notices of intent to be notices of appeal, while other reviewing courts routinely reject all premature notices of intent, relying on the parties to determine whether to file a subsequent notice of appeal. The committees concluded that the latter approach, with some additional safeguards, was preferable. Thus, rather than requiring the Court of Appeal to review all premature notices of intent under rule 8.450 and determine whether they should be construed as notices of appeal, this proposal is intended to protect parents' potential appellate rights by notifying them and their counsel that their notice of intent was either premature or late and thus not filed. This proposal would further require that the clerk's notice indicate that the party should contact his or her attorney as soon as possible to discuss this notice because the time available to take appropriate steps to protect the party's interests may be short. This will give the party and attorney the opportunity to determine whether an appealable issue exists and how best to proceed. Because the time to file a notice of appeal is much longer than the time to file a notice of intent—typically 60 days from notice of entry of the order rather than 7 days from issuance of the order—there should be sufficient time for such consultations and, if appropriate, the timely filing of a notice of appeal. The committees also concluded that this approach will reduce potential confusion among litigants about whether or not a court is considering the issues raised in a premature notice of intent. This is important because a party who mistakenly believes the court is considering such issues may decide not to file a notice of appeal. Since the deadline for filing a notice of appeal is jurisdictional, inaction can result in the loss of the party's right to appeal.

Correcting cross-reference. Subdivision (g)(2) of rule 8.450 currently cross-references to rule 8.404(a) for a list of the items that must be included in a clerk's transcript. Effective July 1, 2010, however, the rules relating to appeals in juvenile cases were revised and rule 8.404 no longer addresses the contents of clerk's transcripts. The provisions relating to the contents of clerk's transcripts in juvenile appeals are now in rule 8.407. This proposal would update the cross-reference in rule 8.450(g) so that it correctly refers to rule 8.407.

Comments, Alternatives Considered, and Policy Implications

Comments

This proposal was circulated between April 17 and June 15, 2012, as part of the regular spring 2012 comment cycle. Nine individuals or organizations submitted comments on this proposal. Four commentators agreed with the proposal, four agreed with the proposal if modified, and one did not indicate a position on the proposal but provided suggestions for modifying it. The full text of the comments received and the committee responses are set out in the attached comment chart at pages 13-29. The main substantive comments and the committee's responses are also discussed below.

This proposal is a modified version of a proposal that circulated for public comment in the spring of 2011. The main difference between the 2011 and 2012 proposals was how they addressed

premature notices of intent under rule 8.450. Because the 2011 comments on this issue influenced the committees' recommendation, those comments are also discussed below.

Removing alleged parents from the list of those who must be notified of a notice of intent. The proposal circulated for public comment in 2012 proposed removing alleged parents from the list of those to whom the clerk must send copies of any filed notice of intent. Two commentators indicated that removing alleged parents from this lits would be inconsistent with statutes and case law that require that alleged fathers receive notice of both the referral hearing and the section 366.26 hearing. Based on these comments, the committees revised the proposal to retain alleged parents on the list of those who must be notitifed of the filing of a notice of intent.

Premature notices of intent under rule 8.450. As noted above, two different versions of the proposed amendments regarding premature notices of intent under rule 8.450 were circulated for public comment.

The proposal circulated in spring 2011 provided that, similar to premature notices of intent under rule 8.454, the reviewing could treat premature notices of intent under rule 8.450 as having been filed when the order setting the hearing under section 366.26 is made. Ten of the twelve commentators supported the entire 2011 proposal, including the amendments relating to premature notices of intent, without comment. However, the Los Angeles County Counsel's office did not support this amendment. They suggested that long periods of time may elapse between the premature filing of such a notice of intent and the any actual issuance of an order setting a section 366.26 hearing. As a result, a reviewing court's choice to treat the premature notice of intent as filed when the order setting the hearing is made would require the courts and parties to keep track of premature filings and trial court dates for long periods. This, the commentator suggested, would create an undue burden and opportunities for missing these previously filed notices when the order setting the 366.26 hearing was actually made. The commentator also suggested that this approach might encourage the filing of premature notices of intent.

Members of the Appellate Advisory Committee sought input on this issue from staff attorneys, clerks, and others in different Court of Appeal districts. The input received raised additional concerns about the premature or unnecessary preparation, at court expense, of the record in these circumstances. The input also highlighted different practices in different districts with respect to such premature notices. Based on the public comments and additional input from the courts, the committees decided to seek public comment on a revised proposal regarding the handling of premature notices of intent under rule 8.450.

The proposal circulated in spring 2012 provided that the clerk would not file a premature notice of intent, but would instead return it to the individual who tried to file it, along with a notice explaining why it was not filed, and also send notice to the individual's attorney. Seven of the nine commentators agreed with this approach to premature notices (this includes those commentators who expressed agreement with the proposal as a whole). However, two

commentators disagreed with this approach, recommending instead that the approach in the original 2011 proposal be adopted. The main reasons given by these two commentators for this opposition were that:

- This approach is inconsistent with the approach taken with respect to premature notices of intent under rule 8.454 and premature notices of appeal;
- It would eliminate the Court of Appeal's discretion to accept a notice of intent that may be only slightly premature, which could result in additional costs associated with returning and later re-filing of a notice of intent;
- It would eliminate the Court of Appeal's discretion to treat premature a notice of intent as a timely notice of appeal, which could result in additional costs associated with returning the notice of intent and-filing of a notice of appeal; and
- Parties who file these notices on their own may not understand or be able to re-file a timely notice of intent or notice of appeal and may therefore lose their ability to challenge certain rulings.

The committees discussed these public comments at length and considered several different approaches to the handling of prematurely filed notices of intent under rule 8.450, including:

- Providing that the notice of intent not be filed and that it be returned to party, as suggested in 2012 invitation to comment;
- Providing that the notice of intent not be filed and that it be returned to party with a notice that urges parties to consult their attorneys as soon as possible and adding an advisory committee comment indicating that the rejection of a premature notice of intent shortly before the issuance of an order setting a hearing under section 366.26 may be good cause for an extension of time for subsequently filing a notice of intent;
- Providing that the trial court must receive but not file the premature notice of intent and transmit it to the reviewing court, and the reviewing court must decide whether to reject, hold, or file it as notice of appeal and must notify the party and the trial court of the action taken;
- Providing that the reviewing court may treat the notice as filed immediately after the order setting a 366.26 hearing has been made, as suggested in the 2011 invitation to comment; and
- Not recommending any provision on premature notices of intent under rule 8.450 at this time.

Ultimately, the committees supported the second option above because they concluded that this approach would:

- Make clear to litigants that premature notices of intent will not be accepted;
- Make clear to litigants that a court is not considering issues that were inappropriately raised in a notice of intent;

- Protect parties' potential appellate rights by giving them prompt notice and an opportunity to receive timely advice from their attorneys about when to file a notice of intent or whether an issue that they tried to raise through a notice of intent is actually appealable;
- Protect parties from missing the short deadline for timely filing of a notice of intent if a section 366.26 hearing is set soon after rejection of a premature notice of intent by clarifying that this may be the basis for extending the time for filing a notice of intent;
- Be easy for trial court clerks to implement, since it is easy to see if an order setting a section 366.26 hearing has been issued by the trial court;
- Avoid potentially unnecessary preparation of the record in these cases, saving trial courts time and money;
- Eliminate necessity for review of these premature notices of intent by the Court of Appeal, saving them time and money; and
- Avoid the necessity for holding a premature notice and tracking by the trial court and Court of Appeal of whether or when an order terminating reunification and setting a 366.26 hearing is actually issued.

Late notices of intent. Both the 2011 and 2012 proposals included a provision regarding late notices of intent under rule 8.450 that was modeled on rule 8.454's requirement that a late notice of intent to file a writ petition under section 366.28 must be marked "received [*date*] but not filed," the party notified that it was not filed, and, if applicable, a copy of that notice sent to the party's counsel.

Eleven of the twelve commentators on the 2011 proposal supported this amendment (including those commentators who expressed agreement with the proposal as a whole). However, two of the nine commentators on the 2012 proposal suggested that this provision should be modified to provide that a copy of the late notice of intent be sent to the Court of Appeal. One commentator suggested that doing so would allow the Court of Appeal to determine whether to treat the late notice of intent as a timely notice of appeal. The other suggested that this would allow the Court of Appeal to determine whether the notice of intent was actually timely.

The committees did not agree with the suggestion that a copy of the late notice of intent be sent to the Court of Appeal, noting that neither late notices of intent under rule 8.454 nor late notices of appeal are forwarded to appellate courts. Rather than having the Courts of Appeal review late notices, the committees concluded that as with premature notices, the best way to protect parties' potential rights is to notify them and their attorneys that the notice was not filed, explain why, and urge parties to discuss the matter with their attorneys. This gives these parties the opportunity, in consultation with their attorneys, to decide if there is any basis for challenging the determination that the notice of intent was late or whether to file a notice of appeal.

Alternatives Considered

In addition to the alternatives considered in response to the public comments received in both 2011 and 2012, the committees considered not proposing any change to rule 8.450. However, to provide guidance to litigants and courts and reduce expenses associated with the unnecessary preparation of records, the committees concluded that it was preferable to propose this amendment.

Implementation Requirements, Costs, and Operational Impacts

This proposal should not impose significant implementation burdens on the superior courts or Courts of Appeal and should provide significant cost savings for the superior courts.

Relevant Strategic Plan Goals and Operational Plan Objectives

This proposal will further the Judicial Council's Strategic Plan Goal*:* III. Modernization of management and administration and Operational Plan Objective 5: Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.

Attachments

1. Cal. Rules of Court, rule 8.450, at pages 10–12
2. Comment chart, at pages 13–29

Rule 8.450 of the California Rules of Court is amended, effective January 1, 2013, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 5. Juvenile Appeals and Writs

Article 3. Writs

Rule 8.450. Notice of intent to file writ petition to review order setting hearing under Welfare and Institutions Code section 366.26

(a)–(c) * * *

(d) Extensions of time

The superior court may not extend any time period prescribed by rules 8.450–8.452. The reviewing court may extend any time period but must require an exceptional showing of good cause.

(e) * * *

(f) Premature or late notice of intent to file writ petition

(1) A notice of intent to file a writ petition under Welfare and Institutions Code section 366.26 is premature if filed before an order setting a hearing under Welfare and Institutions Code section 366.26 has been made.

(2) If a notice of intent is premature or late, the superior court clerk must promptly:

(A) Mark the notice of intent "Received [date] but not filed;"

(B) Return the marked notice of intent to the party with a notice stating that:

(i) The notice of intent was not filed either because it is premature, as no order setting a hearing under Welfare and Institutions Code section 366.26 has been made, or because it was late; and

(ii) The party should contact his or her attorney as soon as possible to discuss this notice, because the time available to take appropriate steps to protect the party's interests may be short; and

(C) Send a copy of the marked notice of intent and clerk's notice to the party's counsel of record, if applicable.

~~(f)~~(g) Sending the notice of intent

(1) When the notice of intent is filed, the superior court clerk must immediately mail a copy of the notice to:

(A) The attorney of record for each party;

(B) Each party, including the child if the child is 10 years of age or older;

(C) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court as follows:

(i) If the sibling is under 10 years of age, on the sibling's attorney; or

(ii) If the sibling is 10 years of age or over, on the sibling and the sibling's attorney.

(D) The mother, the father, and any presumed and alleged parents;

(E) The child's legal guardian, if any;

(F) Any person currently awarded by the juvenile court the status of the child's de facto parent;

(G) The probation officer or social worker;

(H) Any Court Appointed Special Advocate (CASA) volunteer;

(I) The grandparents of the child, if their address is known and if the parents' whereabouts are unknown; and

(J) If the court knows or has reason to know that an Indian child is involved, the Indian custodian, if any, and tribe of the child or the Bureau of Indian Affairs, as required under Welfare and Institutions Code section 224.2.

(2) * * *

(3) * * *

~~(g)~~(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify each court reporter by telephone and in writing to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

(2) Within 20 days after the notice of intent is filed, prepare a clerk's transcript that includes the notice of intent, proof of service, and all items listed in rule ~~8.404~~ 8.407(a).

~~(h)~~(i) * * *

~~(i)~~(j) * * *

Advisory Committee Comment

Subdivision (d). The case law generally recognizes that the reviewing courts may grant extensions of time under these rules for exceptional good cause. (See, e.g., *Jonathan M. v. Superior Court* (1995) 39 Cal.App.4th 1826, and *In re Cathina W.* (1998) 68 Cal.App.4th 716 [recognizing that a late notice of intent may be filed on a showing of exceptional circumstances not under the petitioner~~'~~'s control].) It may constitute exceptional good cause for an extension of the time to file a notice of intent if a premature notice of intent is returned to a party shortly before the issuance of an order setting a hearing under Welfare and Institutions Code section 366.26 .

Subdivision (e)(4). * * *

Subdivision (f)(1). A party who prematurely attempts to file a notice of intent to file a writ petition under Welfare and Institutions Code section 366.26 is not precluded from later filing such a notice after the issuance of an order setting a hearing under Welfare and Institutions Code section 366.26.

SPR12-04

Appellate Procedure: Premature or Late Notice of Intent to File Writ Petition in Juvenile Dependency Proceeding

(amend Cal. Rules of Court, rule 8.450)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Appellate Court Committee San Diego County Bar Association By: Kate Mayer Mangan Chair	AM	Our committee supports the changes to rule 8.450 except for two matters: (1) We oppose the removal of alleged parents from the list of those to whom the clerk must send copies of any filed notice of intent. The deletion of the requirement is inconsistent with statutory and case law establishing an alleged parent's right to notice and creates the potential for more issues to be raised from the child' s Welfare and Institutions Code section 366.26 hearing, which could create delay in establishing permanence for children. (2) We suggest that rule 8.450 mirror rule 8.454 and retain the discretion of the reviewing court to treat the notice of intent as timely filed when ripe, because courts do occasionally elect to do that for purposes of protecting litigants' rights and/or serving judicial economy. (1) Elimination of notice to alleged fathers An alleged father is entitled to statutory notice once his identity and address are known. (Welf. & Inst. Code, § 316.2, subd. (b).) The statutory right to notice does not make an alleged father a party of record; it merely gives him the opportunity to seek to become one. *(In re Emily R.* (2000) 80 Cal.App.4th 1344, 1352; *In re Joseph* G. (2000) 83 Cal.App.4th 712, 715.) An alleged father's rights are generally limited to an opportunity to appear, assert a position, and attempt to change his paternity status. *(In re*	Based on this and other comments, the committees have modified the proposal to retain notice to alleged parents. See discussion below.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commentator	Position	Comment	Committee Response
			Paul H. (2003) 111 Cal.App.4th 753, 760; *In re O.S.* (2002) 102 Cal.Appo4th 1402, 1408.) Thus, for an alleged father, the only procedural safeguard in place is notice. An alleged father may appear at a referral hearing and raise issues such as notice and standing. To deny the same parent notice of and intent to seek review of the referral hearing would be inconsistent with statutory and case law. Notice to the alleged father of the hearing under Welfare and Institutions Code section 366.26 is required under Welfare and Institutions Code section 294, subdivision (a)(2). The rule change would confine the alleged father's participation to an appeal from that hearing, thus undermining the policy of expediting cases via writ in order to provide permanency to the child. In light of these considerations, our committee does not support the proposed change to remove the requirement of notice to alleged parents, and requests that this provision be revised accordingly. (2) Elimination of reviewing court's discretion to retain premature notice of intent Our committee supports a change to rule *80450,* filling a gap as to premature and late notices of intent, but does not support the proposed elimination of the reviewing court's discretion to	For a variety of reasons, the committees concluded that it was preferable to treat premature notices of intent under rule 8.450 similar to late notices of intent—the superior court clerk would be required to mark the premature notice as "received but not filed" and return it to the party with a notice to the party and his or her counsel

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	Commentator	Position	Comment	Committee Response
			retain a premature notice of intent and deem it filed when an order setting a permanency hearing is made. It is a virtually universal policy of the rules to permit reviewing courts to treat premature notices as filed when ripe. (See, e.g., Cal. Rules of Court, rules 8.104(d) [civil appeals], 8.308(c) [criminal appeals], 80454(f)(1) [writ under Welf. & Inst. Code, § 366.28], 8.822(c) [limited civil appeals to appellate division], 8.853(c) [misdemeanor appeals], 8.902(c) [infraction appeals]; cf. 8.500(e)(3) [petition for review filed before Court of Appeal decision is final in that court must be accepted and filed day after finality].) Courts do, indeed, exercise their discretion to retain premature notices of intent and notices of appeal and to deem them filed at a later time in order to protect litigants, save court resources by avoiding the need to process a new notice, expedite proceedings, and serve other interests. (See e.g., *Caldera Pharmaceuticals, Inc.* v. *Regents of University of Cal.* (2012) 205 Cal.App.4th 338,350, fn. 8; *Vitkievicz* v. *Valverde* (2012) 202 Cal.App.4th 1306, 1310, fn. 2.) Additionally, courts have treated premature notices of intent in many cases (primarily in unpublished opinions) as a notice of appeal from an appealable order, such as termination of reunification services or an order under Welfare and Institutions Code section	that it was not filed because it was premature. It is the committees' understanding that premature notices of intent under rule 8.450 are typically filed by the parents of the child who is the subject of the dependency proceeding. Although these parents are represented in these dependency proceedings, they may file such a notice of intent on their own. At the stage in the juvenile proceedings at which a court might set a hearing under Welfare and Institutions Code section 366.26, and thus at which a notice of intent under rule 8.450 would need to be filed, there are also many other orders that the juvenile court might make. This increases the likelihood that a parent may mistakenly file a notice of intent under rule 8.450 when no order setting a hearing under Welfare and Institutions Code section 366.26 was made, either because the parent mistakenly believes one of these other orders is an order setting a hearing under Welfare and Institutions Code section 366.26 or because the parent actually wishes to challenge a different order made by the court. If such a notice of intent is filed, it triggers the superior court clerk's duties to notify the reviewing court and other parties and to begin preparing the record. Depending on the circumstances, such notification and record preparation may be premature or completely unnecessary. Even if the reviewing court promptly notified the superior court that it was not going to exercise discretion to treat the notice of intent as filed at a later time, the trial court will likely have already begun preparation of the record.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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	Commentator	Position	Comment	Committee Response
			388. If the notice of intent never gets to the Court of Appeal, the court will have no chance to make that judgment call. We are puzzled by the comments noting that it may be undesirable to hold a notice for a protracted period and might be costly if records are prepared for a writ that may never take place. The same can be said of other premature writs under rule 8.454 and appeals as well. This is a discretionary rule, not mandatory. Such factors must be taken into account by the presiding justice or court making the decision. The rules manifest trust in these same decision-makers in analogous situations, and we see no reason to withhold such trust in the rule 8.450 situation.	
2.	Committee on Appellate Courts State Bar of California By: Paul R. Johnson, Chair	A	The Committee on Appellate Courts supports this proposal in general. With respect to the three items for which specific comments were requested, the Committee comments as follows: (1) The proposal appropriately addresses its stated purpose. (2) The same concerns about premature notices of intent are present with respect to notices under rule 8.454 because rule 8.454 addresses late filing but not premature filing. (3) The procedure in this proposal for rule 8.450 should also be applied to rule 8.454 for premature notices.	The committees appreciate these comments
3.	Court of Appeal, Fourth District, Division One	AM	We generally support the proposed revisions to the rule 8.450 regarding premature and late	Based on this and other comments, the committees have modified the proposal to retain

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	By: Hon. Judith D. McConnell Presiding Justice		notices of intent to file a writ petition challenging an order setting a hearing ambiguity in the existing rules and eliminating unnecessary notices and record preparation efforts. However, to the extent SPR 12-04 proposes removal of the existing requirement in Rule 8.450(d)(1)(G) that the notice of intent be served on an alleged parent, we would encourage the Committee to consider whether implementing that change would render the rule inconsistent with applicable statutory law. (Welf. & Inst. Code § 316.2, subd. (b).)	notice to alleged parents.
4.	First District Appellate Project, Appellate Defenders, Inc., and California Appellate Project By: Mat Zwerling Executive Director, First District Appellate Project	NI	The proposed amendment to rule 8.450, which directs superior court clerks to return premature notices of intent to file a writ petition to the attorneys or parties, stands in the way of the authority and discretion of the Court of Appeal to determine whether a notice of intent should be construed as a notice of appeal or, in the case of a truly premature notice of intent, held until ripe. Accordingly, we recommend that the new rule direct the clerk to transmit the premature notices of intent to the Court of Appeal. Many, if not most, "premature" notices of intent are *not* actually efforts to seek appellate-court review of anticipated future orders to be made at a hearing when a 366.26 hearing will be set. Instead, such notices typically express an intent to seek review of orders already imposed, such as an order terminating reunification services which was made at a hearing when a 366.26	The committees understand that in some cases in which a section 366.26 order has not been made, a parent may mistakenly file a notice of intent because they wish to challenge another order made by the court and that some orders that a court may make at this stage in the juvenile proceedings, such as an order terminating reunification services for one parent but not the other, are immediately appealable. The committees understand that, to protect these parents right to appeal in these circumstances, some reviewing courts have construed some such mistakenly-filed notices of intent to be notices of appeal. It is also the committees understanding that other reviewing courts routinely reject all premature notices of intent. The committees concluded that it was preferable to try to protect parents potential appellate rights by notifying the parents and their counsel that a notice of intent (either a premature or late notice) was not filed

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			hearing had not been set. It is not unusual for a party to seek review of orders terminating services or the deny petitions to modify, and such review is sought by appeal, rather than writ, when a section 366.26 hearing has *not* been set. (See, e.g., *In re B.L.* (2012) 204 Cal.App.4th 1111, *In re Gabriel K.* (2012) 203 Cal.App.4th 188, and *In re Jennifer O.* (2010) 184 Cal.App.4th 53 [denial or termination of reunification services appealed]; *In re Anthony W.* (2001) 87 Cal.App.4th 246, *In re Matthew P.* (1999) 71 Cal.App.4th 841, *In re Kimberly F.* (1997) 56 Cal.App.4th 519 [denial of § 388 motion appealed]; see generally Welf. & Inst. Code, § 395 [judgment declaring child dependent of court under § 300 and "any subsequent order" may be appealed].) When a party mistakenly files a notice of intent, rather than a notice of appeal, having the clerk return the notice of intent unfiled prevents the reviewing court from exercising its discretion, and perhaps duty, to construe the notice of intent as a timely notice of appeal. "'It is, and has been, the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what [the] appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.'" (*In re Joshua S.* (2007) 41 Cal.4th 261, 272.) This principle is already embodied in the rules governing appeals in juvenile cases: "The notice	and by indicating in the clerk's notice that the party should contact his or her attorney as soon as possible to discuss this notice because the time available to take appropriate steps to protect the party's interests may be short. This will allow the party and attorney the opportunity to determine whether there is an appealable issue and how best to proceed. Because the time to file a notice of appeal is much longer than the time to file a notice of intent – typically 60 days from notice of entry of the order rather than 7 days from issuance of the order – there should be sufficient time for such consultations and the timely filing of a notice of appeal if that is appropriate. The committees also concluded that this approach will reduce potential confusion among litigants about whether or not a court is considering the issues raised in a premature notice of intent.

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			of appeal must be liberally construed, and is sufficient if it identifies the particular judgment or order being appealed. The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located." (Rule 8.405(a)(3).) The proposed rule removes from the process the opportunity for a Court of Appeal to construe the premature notice of intent as a timely notice of appeal. While we have not identified published decisions in which the Court of Appeal construed a notice of intent to be a notice of appeal, there are unpublished opinions doing so, and we found no published decisions in which the Court of Appeal refused to do so.[2] [2] *In re Albert G.* (2009) 2009 WL 3273947, at 3 ["we construe mother's notice of intent to file a writ petition as a timely notice of appeal"]; *In re E.A.* (2009) 2009 WL 3020079, at 1 ["We find that Mother's Notice of Intent to File Writ Petition should be deemed a notice of appeal"]; *In re M.D.* (2008) 2008 WL 4416249 at 5-6 [rejecting department's argument that notice of intent could not be construed as notice of appeal]; *In re Talia B.* (2007) 2007 WL 3245536, at 2 ["the court notified the parties that the notice of intent to seek extraordinary writ relief shall be construed as a timely filed notice of appeal"]; *In re Marissa G.* (2006) 2006 WL 3423388, at 3 ["this court construed	

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			the notice of intent as a notice of appeal"]; *In re Richard R., Jr.* (2006) 2006 WL 2848084 at 3, fn.4 [granting unopposed request to treat notice of intent as timely notice of appeal]; *In re Brandi A.* (2004) 2004 WL 551247, 3 ["Mother filed a notice of intent to file a writ petition, which has been construed to be a notice of appeal"]. There may be other reasons for a reviewing court to have an opportunity to pass on the notice of intent. Sometimes the reviewing may wish to hold the petition until it ripens, thus protecting litigants with limited resources and allowing the clerks and reporters to get a head start on preparing the record. For this reason, rule 8.450 should mirror rule 8.454(f)(1), as well as 8.406(d), by stating that the reviewing court may (but is not required to) treat a premature notice of intent as filed immediately after the order setting a hearing for a permanent plan. Permitting such discretion seems to be a virtually universal policy of the rules. (See, e.g., rules 8.104(d) [civil appeals], 8.308(c) [criminal appeals], 8.822(c) [limited civil appeals to appellate division], 8.853(c) [misdemeanor appeals], 8.902(c) [infraction appeals]; cf. 8.500(e)(3) [petition for review filed before Court of Appeal decision is final in that court *must* be accepted and filed day after finality].) Regarding the concern that in the section 366.26 situation, particularly, there may be a long delay	

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			before the writtable order is issued, we propose a rule that is *discretionary* and *permissive*, not mandatory. Delay, judicial economy, likelihood of an adverse writtable or appealable order, and prejudice to the opposing party are among the factors the presiding justices might consider. In sum, the proposed rule impedes the Court of Appeal from exercising its judicial discretion to construe the notice of intent as a notice of appeal, hold it until it ripens, or dismiss it outright. In addition, a rule that is permissive will enable courts to decline to hold premature notices of intent for inordinately long time. Accordingly, we recommend that the proposed rule direct the superior court clerk to process the premature notices of intent and transmit them to the Court of Appeal, which can then exercise its discretion over the matter. *Additional comments for possible future amendment cycle.* We have two additional related comments that may be outside the scope of the current proposal and, thus, more appropriate for a future amendment cycle. Many *late* notices of intent, as well as premature ones, could also give rise to an appeal. The time frames for notices of intent are much tighter than those for notices of appeal, and a late notice of intent would often be timely as a notice of appeal. (Compare rules 8.450(e)(4)	The committees considered this suggestion but decided against proposing this change. The committees concluded that it would not be the best use of Court of Appeal resources to review all late notice of intent to determine whether they should be treated as notices of appeal. Instead, the committees concluded that such late notices should be sent to the party and party's attorney and the party urged to discuss the issue with his or her attorney. This allows the party and attorney to determine whether, in the particular case, there is a basis to ask the Court of Appeal either to treat the notice of intent as timely filed or to treat it as a

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			and 8.454(e)(4)-(5) with rule 8.406.) Courts often will do the reverse: treat a notice of appeal as a notice of intent, when appropriate and timely (e.g., *In re K.P.*, 2009 WL 1845239; *In re Jacquelyn B., 2007 WL 1244476*; *In re Danielle L.*, 2007 WL 61907), and there is no reason a reviewing court could not treat a late notice of intent as a timely notice of appeal. As we suggest for premature notices of intent, late notices of intent could also be transmitted to the reviewing court, so that it might exercise its discretion in the matter. By way of comparison, a late notice of appeal is not sent to the reviewing court in criminal or juvenile appeals: instead the clerk marks it "received but not filed," notifies the party it was not filed, and sends a copy of the marked notice of appeal to the appellate project. (Rules 8.304(d), 8.406(c); cf. rule 8.104(b) [reviewing court must dismiss civil appeal filed late].) Transmitting the late notices of appeal to the appellate project, but not to the Court of Appeal, makes sense in the case of a late notice of appeal because a Court of Appeal can, at least in criminal cases, remedy a late notice of appeal only by granting writ relief or a motion equivalent (e.g., *Roe v. Flores-Ortega* (2000) 528 U.S. 470 or *In re Benoit* (1973) 10 Cal.3d 72, 80), which requires an application on behalf of the appellant. A late notice of intent, in contrast, may be construed as a notice of appeal without any application on behalf of the petitioner. Accordingly, it makes sense to have clerks transmit late notices of	notice of appeal.

	Commentator	Position	Comment	Committee Response
			intent to the Court of Appeal, even though the same is not done for late notices of appeal. In addition, because many notices of intent are filed in pro per, even when the party had counsel in the juvenile court, the rule should be amended to require that the clerk's notice stating that the notice of intent was not filed be provided to both the party and the party's counsel.	The committees agree with this suggestion and has modified the proposal to incorporate this change.
5.	Los Angeles County Counsel By: James M. Owens Assistant County Counsel	A	No specific comment.	The committees appreciate this input.
6.	Debbie C. Mochizuki Supervising Attorney Fifth District Court of Appeal	AM	I agree with the proposed rule 8.450(f)(1)'s handling of premature notices of intent for each of the concerns expressed under the heading "Prior Circulation." Also, it is a rather simple ministerial task for the clerk to determine whether the notice of intent is premature; if there is no minute order in the record setting a Welfare and Institutions Code, section 366.26 hearing, then a notice of intent is necessarily premature. However, treating a "late" notice of intent in an identical fashion, as set forth in proposed rule 8.450(f)(2), is a different matter. I urge the Appellate Advisory Committee to modify the proposed rule 8.450(f)(2) to add a requirement that a copy of the marked notice also be sent to the court of appeal.	The committees appreciate this input. The committees considered this suggestion but decided against proposing this change. The committees concluded that it would not be the best use of Court of Appeal resources to review all late notice of intent to determine whether they should be treated as notices of appeal. Instead, the committees concluded that such late notices

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			Whether a notice of intent is late depends in part on a clerk's ability to apply Rule 8.450(e)(4), which is rather technical. In addition, there are instances the notice of intent is excusably late, e.g. if the party was not notified either in person or by mail or if the party was only notified by mail, but the mail was not sent to the party's last known address as required by rule of court. This requires more effort and becomes a non-ministerial task to determine whether a notice of intent is late. It has been my experience at the Fifth District Court of Appeal that we receive not infrequently so-called "late" notices of intent which turn out not to be late or are excusably so. Also, "a party's counsel of record" in these matters is usually an over-burdened court-appointed attorney with a large caseload and relatively little experience in juvenile dependency law. Relying on such counsel to evaluate whether the party's notice is in fact untimely and take action is unrealistic. It also takes additional time when time is so "of the essence" in reviewing challenges to setting orders. Furthermore, what action could counsel take if counsel believed the clerk made a mistake? I am aware that the language in proposed rule 8.450(f)(2) tracks not only the current rule 8.454(f), but also the rule on belated notices of	should be sent to the party and party's attorney and the party urged to discuss the issue with his or her attorney. This allows the party and attorney to determine whether, in the particular case, there is a basis to ask the Court of Appeal either to treat the notice of intent as timely filed or to treat it as a notice of appeal.

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			appeal in criminal cases (rule 8.308(d)). However, in the case of rule 8.308(d), a copy of a "received but not filed" notice of appeal goes to the district appellate project which can investigate and advise the party so to how to seek a belated appeal via a petition for writ of habeas corpus. To my knowledge, there is no such remedy in the notice of intent scenario. Modifying the proposed rule to require a copy of the "received but not filed" late notice of intent be sent to the court of appeal would permit the court of appeal, if it so chooses, to review the matter. Most of the courts of appeal have staff specialized in the juvenile dependency law who know what documents to ask the superior court to look for and copy/fax over, e.g. a minute order for the setting of the section 366.26 hearing, a proof of mailing, or a current designation of permanent mailing address. Better to devote a little time at the front end rather than to have to address an issue - that could not be raised because a clerk mistakenly thought a notice of intent was untimely - months or even a year later on appeal from the permanency planning order. (In re Cathina W. (1998) 68 Cal.App.4th 716.) Thank you for considering this comment.	
7.	Orange County Bar Association	A	No specific comment.	The committees appreciate this input.

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8.	Michael M. Roddy Executive Officer Superior Court of San Diego County	AM	**1)** **Rule 8.450(g)(1)(D)** requires the court clerk to mail a copy of the notice of intent to "The mother, the father, and any presumed parents." Because each parent and presumed parent is a party (unless their parental rights have been terminated), isn't this provision redundant in light of the requirement in subd. (g)(1)(B) for the clerk to mail a copy of the notice of intent to "Each party …"? In contrast to rule 8.450(g)(1)(D), there is no separate provision requiring service to parents in rule 8.405(b)(1)(A) (requiring service of notice of appeal to "Each party other than the appellant…" which presumably includes parents). If it is deemed *not* redundant and thus remains in the rule, should it be changed to clarify the distinction between a parent (mother or father) and a "presumed parent"? Perhaps it would be clearer as follows: "The <u>biological</u> mother, the <u>biological</u> father, and any presumed parents." **2)** It would help staff if the processing requirements for the late and premature filing of notices of intents where the same. In the proposal, the late notice is not returned to the parties and the premature notice is returned to the parties. Both processes should be consistent.	The committees considered this suggestion but decided not to modify this language in rule 8.450. In this context, the committees concluded that it would be clearer to list all those who must be sent notice. In addition, the term "biological" mother and father is not used in any other rule in title 8 of the California Rules of Court. The committees agree with this suggestion and has modified the proposal to incorporate this change.

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			3) The proposed changes would greatly assist the court as the current process requires that staff create and submit packets to the Court of Appeal as well as the court reporters.This change would eliminate this extra work. The same challenges are faced with the Notices of Intent filed under Rule 8.454 and applying the proposed changes to this rule would greatly assist the courts.	The committees appreciate this input.
			4) Although this proposed change applies to the Notice of Intents, we strongly urge that the process for the late filing of Notices of Appeal be reviewed and updated. Currently, when a late Notice of Appeal is filed, a packet is submitted to the Court of Appeal and all court reporters are noticed. Staff begins preparing the clerk's transcript and court reporters begin preparing their transcript as well. The VAST MAJORITY of the time, the appeal is dismissed. However, a significant amount of time and effort has already been spent by staff and court reporters due to the short timelines. In addition, if the court reporter has already submitted the transcript before the dismissal, the transcript cost is still incurred. It would greatly assist the courts if the processing of late Notice of Appeals first required that the Court of Appeal determine if the late appeal will be allowed. If it is allowed, then the timelines for preparing everything else, including noticing court	The committees appreciate this comment and will consider this suggestion in the upcoming committee year.

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			reporters, etc. would be triggered from the date the order is made. If the late filing of the appeal is denied, no additional work would need to be done by the trial court. This would be a significant savings in time and costs to the courts.	
			5) As far as implementation: a) Appeals clerks would need to be trained and procedures updated. This would only require a few hours of training in addition to the learning curve time; b) Two months to implement this change is sufficient.	The committees appreciate this input.
			Request for Specific Comments	
			• Does the proposal appropriately address the stated purpose? Yes.	The committees appreciate this input.
			• Are the same concerns about premature notices of intent present with respect to notices under rule 8.454?	.
			With 8.454 writs, there is also the possibility of "a long period between when the court originally received the notice of intent and when the court deems it filed. During this period, it might be unclear to parties whether or not the court is considering the issues raised in the premature notice of intent."	The committees appreciate this input.
			As to the concern about triggering duties for the	

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			trial court clerk, however, it is unclear why these duties would be triggered when the court originally receives the notice of intent as opposed to when it is deemed filed. The latter date should trigger the clerk's duties, in which case there will be no waste of court resources. It is also unclear why a party might "mistakenly believe that he or she must file a notice of intent under rule 8.450 [or 8.454] following the issuance of orders other than the order setting a [.26 hearing]" or a post-TPR placement order. What is in the language of rule 8.454(f)(1) that would cause a party to have this mistaken belief? • Should the procedure proposed for premature notices under rule 8.450—that they not be filed and be returned to the party—also be applied to notices under rule 8.454? Yes, due to the concern about "a long period between when the court originally received the notice of intent and when the court deems it filed."	
9.	TCPJAC/CEAC Joint Rules Committee	A	The working group appreciates the efforts of the advisory committee to provide for a more efficient process.	The committee appreciates this input.