Issues Arising in Dependency Appeals from Review Hearings and the Selection and Implementation Hearing

1. A General Approach to Issue Spotting in Dependency Appeals.
    a. Arguable issues are issues that are arguably meritorious, not necessarily issues on which appellants are likely to prevail.
        i. Arguably meritorious issues are issues for which, under a fair presentation of the record, one can present a reasoned argument under existing case authority, or a reasoned challenge to existing authority, for the relief requested, and which are not procedurally barred.
            (1) An issue is not procedurally barred if one can make a reasoned argument using the record of appeal and supporting authority that the issue may be reviewed despite the apparent procedural bar.
    b. Issue spotting begins with a clear understanding of the relevant statutes and governing constitutional provisions.
        i. In dependency appeals it is essential to understand the requirements of dependency law with regard to the particular stage of the proceedings from which the appeal has arisen, as well as the statutory basis for the orders appealed from.
        ii. It is also necessary to understand where the particular proceeding fits into the larger statutory dependency law scheme.
        iii. There are two overriding concerns which are brought to the table under federal law.
            (1) Because the right to parent is a fundamental right, dependency proceedings must comport with the fundamental requirements of due process - i.e. notice and a fair opportunity to participate

in the proceedings.

(2) Where there is a possibility that the subject child is an Indian child within the meaning of the Indian Child Welfare Act (ICWA), the requirements of ICWA must be complied with until it is appropriately determined that the child is not Indian.

c. Because the ordinary dependency case is, at least in its initial stages, all about reunification of families, it is important to read the record with the following question in mind: why has family reunification not occurred to this point in the case?

i. Often the answer with the most surface appeal will be that the appellant failed in some critical respect to do what he/she needed to do to achieve reunification.

ii. However, the appellate advocate's job is to look for deeper answers which might explain the appellant's failure to succeed:

(1) Have the root problems which led to the breakup of the family been properly identified?

(2) Have services been offered which specifically target the problems which led to the breakdown of the family?

(3) Have the services been reasonable in scope, intensity, and duration, and have they been tailored to the individual needs of the recipient?

(4) If not, have the appellant's advocates and the juvenile court addressed the shortcomings of the reunification efforts appropriately?

(5) What could have been done that was not done, and how would that have improved the appellant's chances for reunification?

iii. Identifying why the appellant has not succeeded in his/her reunification bid often will lead to arguments that either the Department of Social Services ("the Department"), the court, or the

appellant's counsel failed in some respect to do what was necessary to achieve the goal of reunification.

d. A similar approach can be used to identify issues arising from specific hearings or proceedings.

i. By proceeding with the initial assumption that the appellant should have succeeded, and asking why the appellant was not successful, one may be able to identify the critical pont where the proceedings went wrong for the appellant.

ii. Having identified what went wrong, the legal arguments may naturally suggest themselves.

e. Finally, because the due process afforded parents in the dependency scheme depends upon strict adherence to the procedural requirements of the scheme (*In re Marilyn H.* (1993) 5 Cal.4th 295), even modest procedural irregularities can present an arguable basis for reversal.

2. Issues Arising at Review Hearings - generally.

a. Was the appellant denied a due process right to a hearing? (*In re James Q.* (2000) 81 Cal.App.4th 255.)

b. Was the appellant denied a due process right to a social study/ report?

i. If a report is required in the making of a dependency decision, the absence of the report is a non-waivable due process violation that is cognizable on appeal. (*In re Linda W.* (1989) 209 Cal.App.3d 222 [reversal of parental rights termination where Department failed to prepare a mandatory written report]; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411 [while court noted that absence of a report implicates a due process violation, omissions in a report may not make the order reversible].)

c. Did the juvenile court appropriately deny or grant appellant's or the Department's request for a continuance?

i. In *In re Julian L.* (1998) 67 Cal.App.4th 204, the appellate court

reversed the termination of parental rights when, *inter alia*, the court refused to grant the mother's counsel a continuance. Counsel stated that he had not yet had an opportunity to ascertain the mother's wishes. The appellate court stated the juvenile court erred in refusing the continuance because counsel needed to effectively represent the mother. Furthermore, the court found the additional delay would not have negatively affected the minor's interest in stability.

d. Were trial or evidentiary objections properly considered and ruled on by the juvenile court?

e. Did substantial evidence support the juvenile court's decision not to return the minor to the appellant's care?

   i. ". . . [t]he court shall order return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (Welf. & Inst. Code, § 366.21, subd. (e) & (f); see also, § 366.22, subd. (a) [similar language] .)

f. Did substantial evidence support the juvenile court's determination that reasonable reunification services were provided by the Department in the period preceding the review hearing? (Welf. & Inst. Code, §§ 366, subd. (b), 366.21, subd. (e) & (f), 366.22, subd. (a).)

g. Did the juvenile court fail to order additional services which would facilitate the return of the child to the appellant's custody? (Welf. & Inst. Code, § 366.21, subd. (a).)

h. Were issues regarding visitation properly considered and ruled on by the juvenile court?

   i. Did the juvenile court improperly delegate its judicial authority regarding visitation?

(1) Did the juvenile court improperly delegate its authority to the Department? A judicial order allowing supervised visitation of the father and a child as "arranged through, and approved by" the county human services agency was invalid as an improper delegation of judicial authority. The order, although it did not authorize the agency to determine whether the parent had the right to visitation, gave the agency no guidance as to when, how often, and under what circumstances visitation was to occur. (*In re Shawna M.* (1993) 19 Cal.App.4th 1686, 1690.)

(2) Did the juvenile court improperly delegate its authority to a therapist? The Second District Court of Appeal, Division Four, reversed an order that a father have no visitation rights without permission of minors' therapists, because the order unlawfully delegated judicial authority by conditioning visitation on the children's therapists' sole discretion. (*In re Donnovan J.* (1997) 58 Cal.App.4th 1474, 1475-1477.)

(3) Did the juvenile court improperly delegate its authority to the children? The Fourth District, Division Three, held that the juvenile court abused its discretion in giving the children absolute discretion to decide whether their mother could visit with them because the order essentially delegated judicial power to the children. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 48-49.)

ii. Did the juvenile court fail to define the parameters of visitation?

(1) A court must "define the rights of the parties to visitation." (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757.) The court may delegate "ministerial tasks of overseeing the right [to visitation] as defined by the court" to a child protective services agency. (*Ibid.*) Within guidelines established by the

court, the child protective services agency may exercise flexibility in managing the visitation. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1375; *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1237; but see *In re Jennifer G., supra*, 221 Cal.App.3d at p. 757 [stating in dicta that a court should determine frequency and length of visitation].)

iii. Did the juvenile court impermissibly interfere with the parent's right to visitation?

(1) When the state removes children from their parents, it is obliged to make reasonable efforts to reunify the family. The Fifth District Court of Appeal reversed an order precluding jail visitation because of the child's young age. (*In re Dylan T.* (1998) 65 Cal.App.4th 765, 769.) The Third District Court of Appeal reversed an order placing minors with relatives in Southern California when the mother lived in Northern California. (*In re Luke L.* (1996) 44 Cal.App.4th 670.)

3. Issues Arising from the Filing of a Contemporaneous Welfare and Institutions Code Section 387 Petition.

a. Requirements of the statute.

i. "An order changing or modifying a previous order by removing a child from the physical custody of a parent, guardian, relative, or friend and directing placement in a foster home, or commitment to a private or county institution, shall be made only after noticed hearing upon a supplemental petition." (Welf. & Inst. Code, § 387.)

ii. A supplemental petition differs from a subsequent petition in that a supplemental petition is filed, *inter alia*, when a dependent child has been placed with a parent, but the Department later seeks to remove the child, effectively requesting the court to modify its previous placement order. (*In re Barbara P.* (1994) 30 Cal.App.4th 926.)

b. Was there adequate notice of the request for a change or modification of a prior placement order?

i. Upon filing of a supplemental petition, the child's parents, guardians and "present custodian" must be given notice of both the hearing and the contents of the supplemental petition. (Cal. Rules of Court, rules 1407(e), 1431(c); see also Welf. & Inst. Code, § 387, subd. (b).)

ii. Notice is required "so that the parents and any other interested parties are apprised of the allegations they must be prepared to meet." (*In re Neal D.* (1972) 23 Cal.App.3d 1045, 1050, overruled on other grounds in *In re B.G.* (1974) 11 Cal.3d 679, 691, fn. 15.)

c. Did the supplemental petition plead facts sufficient to support the relief requested?

i. The section 387 petition must "contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child, or, in the case of a placement with a relative, sufficient to show that the placement is not appropriate in view of the criteria in Section 361.3." (Welf & Inst. Code, § 387, subd. (a).)

ii. The same principles applicable to a petition for a section 300 finding of jurisdiction would apply here. For example, the Third District Court of Appeal reversed the juvenile court orders finding jurisdiction under section 300, subdivision (b) because the pleading did not establish a "failure to protect" the minor or that the minor was currently at any risk of serious physical harm. (*In re Alysha S.* (1996) 51 Cal.App.4th 393.) But see *In re Shelley J.* (1998) 68 Cal.App.4th 322, 328, in which the Sixth District disagreed with *Alysha S.'s* finding that a party may contend, for the first time on appeal, that a petition failed to state a cause of action, and stated that juvenile cases are governed by Penal Code section 1012, which provides that the

failure to demur to defective pleadings waives the defect.

d. Was there sufficient evidence to support a finding that the previous disposition has not been successful in the rehabilitation or protection of the minor, or that a relative placement is no longer appropriate?

   i. In *In re Samkirtana S.* (1990) 222 Cal.App.3d 1475, 1485-1488, the Fourth District Court of Appeal, Division One, ruled that substantial evidence showed that the mother's excessive drinking and failure to adequately supervise her children supported the court's conclusion that the previous orders were ineffective in protecting the children.

e. Was there sufficient evidence that a return of the children to the parent's custody would create a substantial risk of detriment to the children's well-being? Court can take into account past and present circumstances in making the order to remove the children. (*In re Michael S.* (1987) 188 Cal.App.3d 1448, 1458.)

f. Did the juvenile court fail to hold a dispositional hearing with regards to the supplemental petition?

   i. When a supplemental petition is filed under section 387, a bifurcated hearing (a jurisdictional hearing followed by a discrete dispositional hearing) is required. Failure to hold both hearings requires reversal as to the dispositional order only. (*In re Fred J.* (1979) 89 Cal.App.3d 168, 178, 181, citing Cal. Rules of Court, rule 1392(d)(2); see also Advisory Committee com. to rule 1392.)

g. Were trial or evidentiary objections properly considered and ruled on by the juvenile court?

h. Did the interests of the minors conflict such that separate counsel should have been appointed for each minor?

   i. In *In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 555-556, the Fourth District Court of Appeal, Division Two, held that in dependency proceedings involving several siblings, the issue of the

children's right to separate minor's counsel was cognizable on appeal despite the failure of the children and their father to raise the issue below. If minor's counsel have a potential conflict of interest, the parties should not be deemed to have waived the issue. But see *In re Candida S.* (1992) 7 Cal.App.4th 1240, 1252, in which the Sixth District Court of Appeal disagreed with the *potential* conflict of interest standard applied in *Elizabeth M.* and instead applied an *actual* conflict of interest standard.

i. Where the prior placement was with an out-of-state relative, is the juvenile court an appropriate forum to determine the issues?

i. In *In re Christopher B.* (1996) 43 Cal.App.4th 551, 556, the Second District Court of Appeal, Division Five, explained that forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. But it found that the aunt who had care of children in Tennessee waived an objection on forum non conveniens grounds by failing to assert it in the California-based juvenile court.

4. If There Was a Contemporaneous Welfare and Institutions Code Section 388 Petition, Are There Issues Relative to the Petition?

a. Relevant statutory language.

i. A dependency court order may be changed or modified under section 388 if a petitioning parent establishes one of the statutory grounds – changed circumstances or new evidence for the modification – and also proves that the proposed changes would promote the best interests of the child. (Welf. & Inst. Code, § 388; Rules of Court, rule 1432(c).)

b. Was the correct standard employed by the court?

i. The parent requesting the change bears the burden of proving by a preponderance of evidence that the change is justified. (*In re Audrey D.* (1979) 100 Cal.App.3d 34, 43; *In re Fred J.* (1979) 89 Cal.App.3d 168, 174-175.)

c. Did the parent show changed, as opposed to changing, circumstances?

i. Nine months of being drug free was sufficient to establish changed circumstances. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 49.)

d. Did the court deny appellant due process by failing to afford him or her a hearing on the section 388 petition?

i. The juvenile court is required to order a hearing upon proper notice "[i]f it appears that the best interests of the child may be promoted by the proposed change of order, . . ., or termination of jurisdiction." (Welf. & Inst. Code, § 388, subd. (c).)

(1) The Third District Court of Appeal held that the juvenile court erred in denying the mother's request for an evidentiary hearing on her petition. The mother sufficiently pleaded changed circumstances as to herself, and the juvenile court erred in concluding that she needed also to plead changed circumstances as to the minors. The mother also alleged sufficient evidence that the best interests of the minors would be promoted by their reunification with their siblings. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 673-674.)

(2) To be entitled to a hearing, appellant needed only to establish probable cause, not a probability of prevailing on her petition. Three declarations attached to the mother's petition established a strong prima facie showing of a favorable change in the mother's ability to provide the child with a stable home, which was the only negative factor supporting the juvenile court's termination of reunification services and setting of a hearing

on termination of the mother's parental rights. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414-1415.)

(3) An adequate showing of changed circumstances to warrant a section 388 hearing was made where the petition described the mother's continuous participation in individual therapy for more than 18 months, which was so successful that her therapist recommended the minor be returned to her custody. (*In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1799.)

(4) The Second District Court of Appeal, Division Four, reversed an order for long-term foster care as the permanent plan, where the mother was denied an evidentiary hearing on her section 388 petition. The petition clearly made out a prima facie case of changed circumstances. She had completed numerous educational programs and parenting classes, and had tested clean in weekly random drug tests for over two years. She had visited consistently with the children and continued to have a strongly bonded relationship with them. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) Further, the section 366.26 hearing was not an adequate substitute for a hearing on the mother's section 388 petition. (*Id.* at p. 433.)

e. Was the appellant provided effective assistance of counsel in connection with the section 388 petition?

i. Mother made a prima facie showing of prejudicial ineffective assistance of counsel, since it was reasonably probable that a result more favorable to her would have occurred had her trial counsel filed a section 388 petition. The problem leading to the dependency was the mother's inability to be present when the father physically abused the child. The mother began seeing a counselor, she attended parenting classes, she entered a rehabilitation program, and she began divorce

proceedings. The current caretakers did not really want to adopt the child, so the bond factor overwhelmingly favored the mother. The father who abused the child was incarcerated. Given the probability that a modification petition would have been successful, the mother demonstrated a prima facie case of prejudicial ineffective assistance. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248.)

f. Were trial or evidentiary objections properly considered and ruled on by the juvenile court?

   i. The Fourth District Court of Appeal, Division Three, held that the juvenile court's admission of the social service reports without allowing the de facto parents to cross-examine the preparers denied the de facto parents their due process rights. Although California Rules of Court, rule 1432(f), gives juvenile courts the discretion to disallow evidence, in this case, given the de facto parents' three-year history with the minors, including their undisputed care and concern for them, and their allegations that the social workers' statements were inaccurate, they were entitled to a full hearing. (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 851.)

g. Did the interests of the minors conflict such that separate counsel should have been appointed for each minor? (See *In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 555-556, *In re Candida S.* (1992) 7 Cal.App.4th 1240, 1252 discussed *supra* under section 387 petitions.)

h. Was the juvenile court’s order with respect to the section 388 petition an abuse of discretion?

   i. The court reversed the denial of a 388 petition to modify the juvenile court's termination of reunification services and termination of the mother's parental rights where the mother showed her home was no longer in the unsanitary and unsafe condition that had originally justified removal of the children. Further, the assessment that the

mother was narcissistic could not constitute a basis for removal of the children or a finding of detriment. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532-533, 535-536.)

5. Are There Issues Relative to the Welfare and Institutions Code Section 342 Subsequent Petition?

   a. Relevant statutory language.

      i. A subsequent petition is filed when new, independent allegations of dependency can be made after the court has initially declared a minor to be a dependent child. (Welf. & Inst. Code, § 342.)

   b. Have all the procedures applicable to the original dependency petition been followed with regard to the section 342 petition?

      i. Section 342 states that "[a]ll procedures and hearings required for an original petition are applicable to a subsequent petition."

   c. Was appellant deprived of due process because he or she did not receive adequate notice of the grounds upon which the minor was removed from the home? Should the Department have filed a subsequent petition?

      i. The Fifth District Court of Appeal reversed the juvenile court's denial of appellant's petition to terminate jurisdiction. The jurisdictional finding was based upon the mother's maintenance of an unsuitable home, but the mother found a suitable home and moved to terminate jurisdiction. However, a social worker's report, filed in opposition to the mother's motion, dealt with completely new circumstances, physical, mental, emotional and social problems, none of which were considered in the original hearing. The court concluded the mother had been denied due process because the mother had not received adequate notice of the grounds upon which the minor was removed from the home. A subsequent petition, alleging the completely new conduct should have been filed. (*In re Neal D.* (1972) 23 Cal.App.3d 1045, overruled on other grounds in *In re B. G.* (1974) 11 Cal.3d 679,

691, footnote 15.)

ii. However, the Third District Court of Appeal has ruled that where the conduct or circumstances shown at the disposition hearing tend to explain the conduct or circumstances alleged in the sustained petition, the conduct or circumstances are not "new" and no new petition need be filed. Due process is satisfied if the child is removed from parental custody on the basis of the same ultimate fact(s) as have been alleged in the sustained petition. (*In re Rodger H.* (1991) 228 Cal.App.3d 1174, 1183.)

d. Is a subsequent petition appropriately utilized in the proceedings?

i. A subsequent petition is an inappropriate vehicle for new allegations where the original petition has been dismissed. (*In re Lauren P.* (1996) 44 Cal.App.4th 763, 766, fn. 1.)

e. Were trial or evidentiary objections properly considered and ruled on by the juvenile court?

f. Is there substantial evidence supporting the juvenile court's true finding on the subsequent petition?

g. If the subsequent petition was sustained, but no additional reunification services were ordered, did the juvenile court abuse its discretion in failing to order additional services?

i. Failure to order additional reunification services after finding jurisdiction on a subsequent petition constitutes reversible error only if there was an abuse of discretion in failing to order additional services. Key factors in this determination are whether the services already offered were adequate, whether they addressed the concerns raised by the subsequent petition, and whether the objectives of the reunification plan could be achieved by adding additional services. (*In re Barbara P.* (1994) 30 Cal.App.4th 926, 934.)

ii. In *Barbara P.*, the First District Court of Appeal held that the mother

would not have benefitted from additional services because she received more than 18 months of services under the original petition, the services offered were relevant to the allegations raised in the subsequent petition, the mother had made no serious progress in therapy, and the Department had provided reasonable reunification services. (*In re Barbara P.* (1994) 30 Cal.App.4th 926, 934.)

6. Issues Relative to the Termination of Services.

   a. Family preservation, which includes the reunification plan and reunification services, is the first priority when child dependency proceedings are commenced. (*In re Heather B.* (1992) 9 Cal.App.4th 535, 541.) Reunification services implement "the law's strong preference for maintaining the family relationships if at all possible." (*In re Rebecca H.* (1991) 227 Cal.App.3d 825, 843.)

   b. Were the necessary precursors to termination of services and the setting of the section 366.26 hearing met?

      i. Did the court erroneously believe that it was required to terminate reunification services?

         (1) The Second District Court of Appeal, Division Seven, ruled that the juvenile court erred in ordering a permanent plan for a minor at the 18-month review hearing on the ground that, although the reunification services provided the family were a "disgrace," the court had no discretion to continue efforts at reunification beyond the 18-month review period. It ordered the juvenile court to determine whether to exercise its discretion to order further reunification services. (*In re Daniel G.* (1994) 25 Cal.App.4th 1205, 1216-1217.)

         (2) Similarly, the Third District Court of Appeal held that the juvenile court erred by terminating reunification services after 18 months, and referring the case for a section 366.26 hearing,

based on the juvenile court's mistaken conclusion that section 366.22 foreclosed any discretion to extend reunification services beyond the 18-month period. Although the mother had been hospitalized during most of the 18 months, she substantially complied with the reunification plan and her record of visitation was exemplary. (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1788.)

ii. Did the juvenile court abuse its discretion in terminating services because the evidence showed reunification services were inadequate?

(1) The First District Court of Appeal, Division One, reversed the judgment terminating parental rights and ordered the Department to develop a reunification plan. Reunification services were deficient because they failed to include a plan for a continuing series of visitations between the child and the incarcerated mother, and visits were instead conditioned on the mother's admission to a limited prison program. The plan also unreasonably delegated to the mother the responsibility of sending her case worker a list of available services in prison, thereby evading the statutory obligation of the Department to provide reunification services. (*In re Monica C.* (1995) 31 Cal.App.4th 296, 307-308.)

(2) The Third District Court of Appeal reversed a judgment terminating the mother's parental rights and directed the juvenile court to provide six months of reunification services with visitation as frequent as possible. The juvenile court abused its discretion in terminating parental rights and ordering the minors placed for adoption. The mother put her children in foster care while she was escaping an abusive environment, but on advice of counsel, she did not deliver hospital records of

her attempted suicide to the court, and visitation was suspended. Adequate reunification services thus were not provided. (*In re David D.* (1994) 28 Cal.App.4th 941, 952-953.)

(3) The First District Court of Appeal reversed the judgment terminating parental rights and ordered the juvenile court to direct the Department to develop a reunification plan where insufficient evidence supported the juvenile court's finding that adequate reunification services were offered to the mother. The Department failed to facilitate visitation during the period the mother was incarcerated, there was no evidence that the Department arranged visitation and since the mother was incarcerated, the Department was responsible for arranging visitation. (*In re Precious J.* (1996) 42 Cal.App.4th 1463, 1475-1481; see also Welf & Inst. Code, § 361.5, subd. (e)(1) [reunification services must be offered to an incarcerated parent "unless the court determines by clear and convincing evidence, those services would be detrimental to the minor"].)

c. Did the juvenile court advise the appellant of his/her right to review the termination of reunification services and setting of the section 366.26 hearing by use of a rule 39.1B writ? (See Welf. & Inst. Code, § 366.26, subd. (l); Cal. Rules of Court, rule 39.1B.)

i. Statutory scheme.

(1) "An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following applies: (A) A petition for extraordinary writ review was filed in a timely manner. (B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record. (C) The petition for

extraordinary writ review was summarily denied or otherwise not decided on the merits." (Welf. & Inst. Code, § 366.26, subd. (l).)

(2) Review of the order setting the section 366.26 hearing and all contemporaneously entered orders may only be had through a petition for a writ of extraordinary relief under rule 39.1B.

(a) Only possible exception to this is with regard to contemporaneous visitation orders, though there is conflicting case authority on this question and as a practical matter the only avenue for timely relief would by a writ petition.

ii. Rule 39.1B writ requirements.

(1) Notice of intent:

(a) Filed within seven days of the order setting the section 366.26 hearing or if made by a referee, within seven days after the order of the referee becomes final.

(b) Signed by the party, not the attorney, except where good cause shown and the party signature rule is waived by the Court of Appeal.

(2) Filing the writ petition. (See, Cal. Rules of Court, rule 39.1B.)

iii. Review of the orders terminating reunification services and setting the section 366.26 hearing may had in the direct appeal from the judgment terminating parental rights in only two situations, one being where a 39.1B writ petition was filed but summarily denied or otherwise not decided on the merits. (Welf. & Inst. Code, § 366.26, subd. (l)(1)(C).)

(1) When the Third District denies a 39.1B writ "on the merits," it will reconsider the issues again if they are raised in the section 366.26 appeal pursuant to *Joyce G. v. Superior Court* (1995)

38 Cal.App.4th 1501, 1514. Because the denial is summary, the petitioner retains his or her appellate remedy (Welf. & Inst. Code, § 366.26, subd. (l)(1)(C)) but is limited to the same issue or the same record. (Welf. & Inst. Code, § 366.26, subd. (l)(1)(B).)

(2) If the section 366.21 or 366.22 or 361.5, subdivision (b) review determinations were a "mere sham", the due process violation may be raised in an appeal from the termination of parental rights. (*In re Rubin P.* (1991) 2 Cal.App.4th 306.) In that case, the juvenile court committed reversible error in entering an order terminating parental rights since the parents were not allowed a contested 18-month review pursuant to section 366.22, subdivision (a).

iv. The second situation where review of the orders terminating reunification services and setting the section 366.26 hearing may be had in the direct appeal from the judgment terminating parental rights is where the appellant was not properly apprised of his/her right to file a rule 39.1B writ.

(1) The Fifth District Court of Appeal held that appellate review of the termination order was proper, even though the mother failed to satisfy the requirement of a section 366.26, subdivision (l), and rule 39.1B, to first pursue extraordinary writ review of the order setting the section 366.26 hearing, since the juvenile court did not give timely or correct notice of the entry of the setting order. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 724-726.)

(2) Where the court failed to advise appellant of her right to writ review to challenge termination of reunification services and setting of the section 366.26 hearing, appellant's claims of

error relating to reunification services are cognizable on appeal. (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 450.)

(3) Trial court erred in terminating parental rights where there was no clear and convincing evidence that mother had failed to comply with the case plan, and she was not advised of her writ review rights. The record was devoid of any evidence to suggest what services, if any, were identified as available or offered to the incarcerated parent. The mother did not refuse to comply with the case plan while she remained incarcerated and was then deported before she could avail herself of the services that were to be provided upon her release. (*In re Maria S.* (2000) 82 Cal.App.4th 1032, 1040-1041.)

7. Issues Relative to the Termination of Jurisdiction (Appeal, Exit Order).

a. When the juvenile court terminates its jurisdiction over a dependent child who is under age 18 and there is a family law proceeding pending in any county, the juvenile court may make a custody or visitation order to be entered in the family law proceeding. (Welf. & Inst. Code, § 362.4.) If no such proceeding is pending, the juvenile court may cause its order to be the sole basis for opening such a file. (*Ibid.*)

i. Did the court err in terminating jurisdiction over the dependent child?

(1) The First District, Division Two, held that the juvenile court lacked authority to dismiss dependency proceedings after ordering a permanent plan of long-term placement with the child's paternal grandmother, then residing with the child in Mexico, without establishing a guardianship. The juvenile court has a continuing responsibility to account for the welfare of a dependent child under its jurisdiction, until a permanent and stable home is established. (*In re Rosalinda C.* (1993) 16 Cal.App.4th 273, 279.)

b. Was the notice of appeal timely filed?

i. The juvenile court, pursuant to section 362.4, ordered the termination of a minor's dependency and transferred physical custody to the father. The court directed the father's counsel to prepare a formal written order incorporating this and other orders originating at the hearing. Sixty-two days later, but less than sixty days after the signing and filing of the court's written order, the mother attempted to file a notice of appeal. The Third District Court of Appeal ruled the notice of appeal was timely filed, holding that section 362.4 plainly envisioned a written order that could be filed in another action (i.e., a marital dissolution proceeding) and did not contemplate that an oral order should be valid. (*In re Markaus V.* (1989) 211 Cal.App.3d 1331, 1337.)

ii. Are there policy reasons why the appeal should not be dismissed even though the time to appeal has expired?

(1) A juvenile court terminated its jurisdiction over the child and split custody equally between both parents, and precluded either party from attempting to modify its custody order in the family court until approximately one year had passed. The Fourth District Court of Appeal, Division Two, did not dismiss as moot the parents' separate appeals notwithstanding that the time period in which modification was precluded had already expired. The problem of nonmodifiable exit orders was one capable of repetition yet evading review, there was an ongoing controversy concerning custody and visitation, and the question of to which court the case should have been remanded implicated the strong public interest in preventing the juvenile dependency system from being used to subsidize private child custody disputes. (*In re John W.* (1996) 41 Cal.App.4th 961,

969.)

c. Did the juvenile court apply the correct standard, the best interests of the child, in making the exit orders?

i. The Fourth District Court of Appeal, Division Two, ruled that the juvenile court committed reversible error in basing its custody decision on the false assumption that it was obligated to split physical custody on the ground that there was no evidence that one parent was any better or worse than the other. In making exit orders, the juvenile court must look to the best interests of the child. The fact that neither parent posed any danger to the child did not mean that both parents were equally entitled to half custody, and that it was in the best interests of the child to split custody. (*In re John W.* (1996) 41 Cal.App.4th 961, 973-974.)

d. Did the juvenile court fail to hear evidence, over a parent's objection, when making its order terminating jurisdiction and transferring the matter to family court?

i. The Second District Court of Appeal, Division Two, held that the juvenile court erred in entering the orders without first holding an evidentiary hearing as requested by the mother to hear evidence concerning her progress in overcoming depression. A dependency court ought to accept all the help it can get before it makes an order affecting the lives of the children and parents who appear before it. The court presumed prejudice because a family law court will naturally defer to a recent order of the dependency court concerning custody and visitation. Thus, the court reversed the order terminating jurisdiction, along with the custody and visitation orders, and remanded for the evidentiary hearing. (*In re Michael W.* (1997) 54 Cal.App.4th 190, 194-197.)

ii. A father attempted to present evidence concerning visitation for the

purpose of modifying the existing visitation arrangement, but the juvenile court limited the hearing solely to the need for continuing jurisdiction. The Fourth District Court of Appeal, Division Three, reversed, holding that when making an order to be transferred to the family court, the juvenile court has the power to hear evidence relevant to that order under section 362.4. (*In re Roger S.* (1992) 4 Cal.App.4th 25, 29-30.)

8. Issues Arising from Welfare and Institutions Code Section 366.26 Hearings.

a. Due process notice issues

i. Has the appellant been properly noticed and given an opportunity to participate in the proceedings?

(1) Welfare and Institutions Code section 366.23, subdivision (a) requires that whenever a court schedules a section 366.26 hearing, the parents and minor, if 10 or older, shall be notified of the time and place of the section 366.26 hearing. The notice shall advise them of the right to counsel, the nature of the proceedings, and that the court shall select a plan of adoption, guardianship, or long-term foster case. It also provides for personal service of the parent with notice, even when the parent is represented by counsel but when the parent was not present at the hearing setting the section 366.26 hearing.

(2) In *In re Julian L.* (1998) 67 Cal.App.4th 204, 208, the Second District Court of Appeal, Division Four, reversed the juvenile court's termination of a mother's parental rights when she was not notified of the section 366.26 hearing. The court held that even though the mother had waived her appearance at a prior hearing, that waiver was specific and covered no other hearing. However, "[t]here is an exception if a parent is present when the hearing is continued." (*In re Malcolm D.* (1996) 42

Cal.App.4th 904, 913.) "Presence at the proceeding assures that the parent is aware of the date of the next hearing, forestalling a claim of lack of notice. (*In re Julian L., supra*, 67 Cal.App.4th at p. 208.)

(3) However, inadequacy of notice occurs even where the parent was present at previous hearing and ordered to attend the 366.26 hearing where the parent was not informed that the permanent plan recommendation was to be adoption. (*In re Anna M.* (1997) 54 Cal.App.4th 463.) In that case, the Fourth District Court of Appeal, Division Three, remanded the case because the trial judge told the mother only that guardianship with relatives she and the children both liked would likely result, without mentioning termination of parental rights and adoption as possible results. Furthermore, statutory written notice was not given.

ii. Is the issue of the termination of parental rights of both parents properly before the juvenile court?

(1) Is there standing to raise notice issues as to other parent? (See California Rules of Court, rule 1463(a).)

b. Was there an objection to the sufficiency of the adoption assessment?

i. Welfare and Institutions Code section 366.22, subdivision (b), requires the agency supervising the child to prepare an assessment report whenever the court orders a section 366.26 hearing. The assessment must include the following six items: (1) current search efforts for absent parent(s); (2) a review of the contact between the child and parents and members of the extended family; (3) an evaluation of the child's medical, developmental, scholastic, mental, and emotional status; (4) an assessment of any prospective adoptive parent or legal guardian that includes a social history including

screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship; (5) the relationship of the child to any identified prospective adoptive parent or legal guardian, the duration and character of the relationship, the motivation for seeking adoption or legal guardianship, and a statement from the child concerning placement and the adoption or legal guardianship, unless the child's condition precludes a meaningful response, and if so, a description of the condition; and (6) an analysis of the likelihood that the child will be adopted if parental rights are terminated.

ii. The issue of deficiencies in the adoption assessment is probably waived if the objections and omissions in report are insignificant. (*In re Diana G.* (1992) 10 Cal.App.4th 1468, 1478.)

iii. However, it may be reversible error if the assessment was not done at all. (*In re Crystal J.* (1993) 12 Cal.App.4th 407.)

c. Does substantial evidence support the juvenile court's finding that the minor was adoptable?

i. At the section 366.26 hearing, there must have been clear and convincing evidence that the child was adoptable. (Welf. & Inst. Code, § 366.26, subd. (c).)

ii. Appellate courts review the factual basis of an adoptability finding by determining whether the record contains substantial evidence from which a reasonable trier of fact could make the finding made by the trial court by clear and convincing evidence. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Christiano S.* (1997) 58 Cal.App.4th 1424, 1431.)

iii. Was there too much emphasis placed on the particular adoptive placement?

(1) The issue of whether a child is adoptable focuses not on a particular adoptive family, but rather on the child. Factors such as a child's young age, good physical and emotional health, progress in therapy, intellectual and academic growth, and ability to develop interpersonal relationships all constitute evidence of adoptability. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1651.)

(2) Caretaker's willingness to adopt by itself is insufficient to find child is adoptable. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.)

(3) The fact that the foster parents are considering adoption is not enough. (*In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065.)

(4) The Third District Court of Appeal held that a section 366.26 hearing does not provide a forum for the minors' parent to contest the "suitability" of a prospective adoptive family. However, if appellant had sought to introduce evidence of some legal impediment to adoption by the prospective adoptive parents, such evidence would have been relevant because the social worker's opinion that the minors will be adopted was based in part on the existence of the prospective adoptive family which was willing to adopt the minors. (*In re Scott M.* (1993) 13 Cal.App.4th 839, 844.)

(5) Where the juvenile court stated that a family showing an interest in adopting the minor "is a long hue and cry away from findings of clear and convincing evidence most likely that the child will be adopted", the Second District Court of Appeal, Division Seven, affirmed the order of guardianship, noting that the Department had over 10 months to find an adoptive home for the minor but failed to place her. (*In re Tamneisha S.*

(1997) 58 Cal.App.4th 798, 807.)

iv. May the appellate court take judicial notice of the subsequent failure of the adoptive placement?

(1) Code of Civil Procedure, section 909, permits appellate courts to make factual determinations contrary to or in addition to those made by the trial court. For the purpose of making the factual determinations, the reviewing court may take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal. The California Supreme Court has reversed the judgment terminating mother's parental rights in light of subsequent material evidence concerning the adoptability of the daughter. After the entry of judgment, but while the appeal was pending, the child's adoptive placement terminated and the parties conceded that the child was no longer adoptable due to her age. (*In re Elise K.* (1982) 33 Cal.3d 138.)

v. Does a minor's membership in a bonded sibling group result in a presumption the child is not adoptable if adoption will permanently sever the sibling relationships? (*Los Angeles County DCFS v. Superior Court* (1998) 62 Cal.App.4th 1, 18 (conc. & dis. opn. of Baron, J.); Welf. & Inst. Code, § 366.26, subd. (c)(3); Welf. & Inst. Code, § 366.22, subd. (b)(2); Welf. & Inst. Code, § 16002; Cal. Rules of Court, rule 1463(d)(5).)

(1) The addition of numerous code sections reflecting the importance being given to sibling relationships may also aid in making such an argument. (See Welf. & Inst. Code, § 388, subd. (b) [a dependent sibling may request placement with another dependent sibling "when making any other request for an order which may be shown to be in the best interest of the

child"]; Welf. & Inst. Code, § 361.2, subd. (j) [regarding placement of siblings upon removal]; Welf. & Inst. Code, § 366, subd. (a)(1)(C) [regarding placement of siblings during periodic status review]; Welf. & Inst. Code, § 16002, subd. (b) [diligent efforts must be made to develop and maintain sibling relationships in all out-of-home placements].)

d. Is there evidence of the minor's wishes?

i. Welfare and Institution Code section 366.26, subdivision (h) requires the court to consider the child's wishes at the section 366.26 hearing.

ii. Does it matter which form (direct testimony, in-chambers discussion, etc.) the evidence of the child's wishes took?

(1) The evidence need not be in the form of direct testimony in court or chambers; it can be found in court reports prepared for the hearing. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 820.)

(2) Direct evidence of the child's wishes can take any of the following forms: formal direct testimony in court; informal direct communication with the court in chambers, on or off the record; reports prepared for the section 366.26 hearing; letters; telephone calls to the court; or electronic recordings. (*In re Diana G.* (1992) 10 Cal.App.4th 1468, 1480.)

iii. When inquiring into the minor's wishes, was the child aware that the proceeding was a parental rights termination action?

(1) The First District Court of Appeal, Division Three, held that the statement must reflect the fact that the child is aware that the proceeding involves the termination of parental rights. (*In re Diana G.* (1992) 10 Cal.App.4th 1468, 1480.)

(2) However, the Fifth District disagrees with *Diana G.'s* findings that evidence of the child's wishes be direct or that the child be

aware that the proceeding is a parental rights termination action. (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1592.)

iv. Was the child too young for the court to note his or her wishes?

(1) The Fifth District Court of Appeal held that the juvenile court did not err in failing to hear evidence regarding the almost-four-year-old minor's wishes, as the statute must be construed to direct the court to consider the child's wishes to the extent ascertainable. The permanency planning report indicated that the minor was too young to understand or express his wishes, and the mother did not challenge this statement in the report. The court held that in the absence of an objection and/or evidence demonstrating otherwise, the juvenile court properly relied upon the statement that the minor could not express his wishes. (*In re Juan H.* (1992) 11 Cal.App.4th 169.)

e. Did the evidence support an exception to the preference to terminate parental rights?

i. Minor is over 12 years old and objects to termination of parental rights. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B).)

ii. Minor is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(C).)

iii. The child is living with a foster parent or relative who is unable or unwilling to adopt the child due to exceptional circumstances, but who is willing to accept legal responsibility for that child and is willing and capable of providing the child with a stable and permanent home, and removal of the child would be detrimental to the child's emotional well-being. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(D).) (This

exception does not apply to a child who is living with a nonrelative and who is either (i) under six years of age or (ii) a member of a sibling group, where at least one child is under six years of age and the siblings are or should be permanently placed together.)

(1) The Fourth District Court of Appeal, Division One, held that this section did not apply where the mother produced no evidence that the caretaker-grandparents were unwilling or unable to adopt the child, although she produced evidence the grandfather would prefer the mother to reunify with the child. Respondent's offer of proof was that the caretaker-grandparents were willing to adopt the child if parental rights were terminated. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 810.)

iv. The parents or guardians have maintained regular visitation and contact with the child, and the child would benefit from continuing the relationship. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A).)

(1) Were both prongs of the exception satisfied?

(a) The statute requires a parent to show there has been regular contact and that the minor would benefit from continuing the relationship. Thus, the exception to termination would not apply even though the father maintained regular visitation and contact with the minors, since the exception requires a parent to show that there has been regular contact and that "the minor would benefit from continuing the relationship." (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 821.)

(2) What is regular visitation?

(3) What is a beneficial relationship? Note, the presence of a beneficial relationship must have been argued below. (*In re*

Melvin A. (2000) 82 Cal.App.4th 1243 [juvenile court has no sua sponte duty to consider issue].)

(a) The exception applies only where the court finds that the regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. The age of the child, the portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575-576.)

(b) In *Autumn H.* the Fourth District Court of Appeal, Division One, held that substantial evidence supported the court's finding that terminating the father's parental relationship would not be detrimental because their relationship was one of friends, not of parent and child, he could not set limits for her, his house was not suitable for her needs, and she had bonded to her foster family and the family wanted to adopt her. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576-577.)

(c) Although mother acted lovingly and appropriately to the child during visits, her relationship with the child was more like a "friendly visitor", and thus, the mother failed to establish that the termination of the relationship would be detrimental to her child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52.)

(d) Evidence was sufficient to show that the mother had a beneficial relationship with the child that would

preclude termination of her parental rights. The child had lived with his mother for the first six and one-half years of his life and expressed his wish to live with her again. Also, expert testimony showed the positive effect of interaction between the child and his mother, and the juvenile court characterized their relationship as parental. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206-1209.)

(e) The juvenile court correctly interpreted "benefit from a continuing relationship" as not applying to a situation when a parent has frequent contact with, but does not stand in a parental role to the child. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.)

f. Should the court have continued the section 366.26 hearing in order to secure an adoptive placement for a "difficult to place child"? (Welf. & Inst. Code, § 366.26, subd. (c)(3).)

i. Child may be difficult to place by virtue of his/her (1) membership in a sibling group, or (2) diagnosed medical, physical or mental handicap, or (3) age of seven or more.

g. Kinship adoption.

i. The Family Code provides for adoption by a relative of a dependent child and for a written and signed kinship adoption agreement between the relative and a birth parent, which shall be attached to and filed with a petition for adoption by the relative. (Fam. Code, §§ 8714.5, 8714.7.) The agreement may include, and is limited to, visitation and future contact with the child and his or her siblings and half-siblings and the sharing of information about the child. (Fam. Code, § 8714.7, subd. (a).)

ii. The Family Code sets forth the obligations of the court and the

Department when a kinship adoption agreement has been filed with the petition for adoption. The Department is required in its adoption report to address whether the agreement is in the best interests of the dependent child. (Fam. Code, § 8715, subd. (c).) If the court finds the agreement is in the best interests of the child, it may include the postadoption privileges contained in the agreement in the decree of adoption. (Fam. Code, § 8714.7, subds. (a) & (b).) The court may approve the termination or modification of the agreement if, for example, the parties agree or it is in the best interests of the child. (Fam. Code, § 8714.7, subd. (h).) But the adoption cannot be set aside for failure to follow the terms of the agreement. (Fam. Code, § 8714.7, subd. (e).)

iii. Generally the courts have not found a duty on the part of the juvenile court to address kinship adoption in the section 366.26 proceedings. *(In re Kimberly S.* (1999) 71 Cal.App.4th 405; *In re Zachary D.* (1999) 70 Cal.App.4th 1392.)

iv. However, because the parents' only avenue for future contact with a dependent child after termination of parental rights may be through a kinship adoption agreement, the parents may have standing to raise an issue of the court's failure to order an assessment of relatives as prospective adoptive parents, or to place the dependent child in the relative placement. This is because failure to so do will affect the parents' opportunity to maintain contact through a kinship adoption agreement.

v. Were the parents barred from entering into a kinship adoption agreement after the termination of parental rights?

(1) The Third District Court of Appeal has held that the opportunity for the parties to consider a kinship adoption agreement remains even after the section 366.26 proceeding.

"There is no time limit for entering a kinship adoption agreement before the entry of a decree of adoption providing the adopting relative has filed the signed agreement with the petition for adoption." (*In re Zachary D.* (1999) 70 Cal.App.4th 1392, 1397, citing Fam. Code, § 8714.5, subd. (d).)

h. Bonding studies.

i. Did the court refuse the parent's request for a bonding study?

(1) A bonding study is not required under the code or case law, but may be requested by a parent and ordered by the court if the facts suggest/support that request. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339-1340.)

(2) Appellant waives the issue of a bonding assessment for purposes of appeal by not asking the juvenile court to order a bonding study before termination of his/ her parental rights. (*Id.* at pp. 1338-1339.)

(3) The juvenile court can properly deny a request for a bonding study when it would necessitate a delay. (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1197.)

i. Are there trial or evidentiary rulings which arguably were prejudicial error under the circumstances of the case?

j. Placement issues.

i. At the section 366.26 hearing, the court after considering the social study report for the hearing, must do one of the following: (1) permanently sever the parent's rights and order the child placed for adoption; (2) without permanently severing parental rights, identify adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days; (3) appoint a legal guardian for the

child and issue letters of guardianship; or (4) order that the child be placed in long-term foster care, subject to the regular juvenile court review. (Welf. & Inst. Code, § 366.26, subd. (b).)

ii. Was the court's preference for its course of action correct?

(1) In selecting a permanent plan for an adoptable child, the court must bear in mind the basic preference for adoption over nonpermanent forms of placement, including guardianship. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728.)

(2) Although relative placement is to be accorded preferential consideration in the initial stages of dependency proceedings, an ongoing caretaker may receive preferential consideration at later times. (*In re Daniel D.* (1994) 24 Cal.App.4th 1823, 1834.) There, the Fourth District Court of Appeal, Division One, ruled that the juvenile court reasonably concluded that once the minor was stabilized in foster care, it was in his best interests to continue such placement instead of subjecting him to the possibility that his grandmother would again become overwhelmed or unwilling to provide for his care. (*Id.* at p. 1835.)

9. Are There Overarching Issues Affecting the Appellant's Right to Relief?

a. Is the issue on which review is sought moot or in danger of becoming moot?

i. The Second District Court of Appeal, Division Five, held that a mother's appeal from an order summarily denying her section 388 motion was moot, where the mother did not appeal from the trial court's subsequent order terminating her parental rights and that order became final. The mother's failure to file a timely notice of appeal from the order terminating parental rights deprived the appellate court of jurisdiction to modify that order. Accordingly, the order terminating parental rights could not be vacated, and no effective

relief could be afforded the mother, even if her appeal of the denial of the section 388 petition was meritorious. (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1316-1317.)

b. Was the order being appealed from entered at a hearing at which the juvenile court set a Welfare and Institutions Code section 366.26 hearing? (See Welf. & Inst. Code, sec. 366.26, subdivision (l) [requiring review via extraordinary writ].)

i. In *In re Charmice G.* (1998) 66 Cal.App.4th 659, the court dismissed the mother's appeal which was barred by section 366.26, subdivision (l) which bars direct appeals from an order setting a permanency plan hearing. (*Id.* at pp. 666-667.) Her appeal also was barred because the juvenile court's denial of her section 388 petition to regain custody of her daughter from the guardian was integrally related to the order for the permanency plan hearing. (*Id.* at pp. 669-671.) However, *Charmice G.* does not apply to a case where the section 388 hearing took place after the setting of a Welfare and Institutions Code section 366.26 hearing.

ii. An unwed father was not foreclosed from appealing the trial court's order denying his petition for reunification services, made under section 388, and the court's order terminating his parental rights. Although rule 39.1B(d) limits review of an order setting a hearing under section 366.26 to review by extraordinary writ, the trial court ordered a section 366.26 hearing long before it gave permission to the father to file a section 388 petition. At the hearing denying that petition, the trial court merely reset the previously ordered section 366.26 hearing. Thus, rule 39.1B was inapplicable, and the father properly appealed the denial of his section 388 petition. (*In re Julia U.* (1998) 64 Cal.App.4th 532, 539.)

c. Was there a contemporaneous objection where necessary to preserve the

issue?

d. Should the issues have been raised in an appeal from an earlier proceeding?

e. Is there a procedural bar to the appeal?

i. After the juvenile court makes an order permanently terminating parental rights, the juvenile court has no jurisdiction to set aside, change, or modify that order. (Welf. & Inst. Code, § 366.26, subd. (i).)

(1) The First District Court of Appeal, Division Four, held that a parent whose rights have been terminated pursuant to section 366.26, cannot subsequently seek to attack that order by filing a motion in the juvenile court under section 388 to modify the order based upon changed circumstances. The juvenile court had no jurisdiction to hear the petition because it was nothing more than a collateral attack, made after the time to appeal had elapsed, on the order terminating parental rights. (*In re Ronald V.* (1993) 13 Cal.App.4th 1803, 1806.)

f. Issues relating to ineffective assistance of counsel.

i. Are allegations of ineffective assistance of counsel reachable on this appeal?

(1) The waiver rule, under which an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order using an appeal from a later appealable order, will prevent an appellant from raising claims relating to her right to, and the inadequacy of, counsel at the previous hearings, since she failed to timely and appropriately raise those claims during earlier appeals. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151.)

ii. Can an ineffectiveness of counsel claim be raised by a petition for a writ of habeas corpus?

(1) The Fifth District Court of Appeal refused to issue an order to show cause in response to a parent's petition for habeas corpus, holding that the mother's claim of ineffective assistance of counsel at a variety of stages in the dependency process had been waived for purposes of a habeas petition filed after a section 366.26 hearing. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1160-1166.)

iii. Example of when ineffective assistance of counsel claim on appeal has been successful.

(1) The Court of Appeal reversed the parental rights termination order and directed the juvenile court to conduct a review hearing to consider, under section 388, whether changed circumstances indicated that the child's best interests would be promoted by offering reunification services to the mother. Counsel for mother was ineffective for not filing a request for a section 388, modification between the denial of reunification services and the section 366.26 hearing. The modification request would not have been frivolous, since the mother had gone out of her way to see a counselor and pay for it herself, she had taken classes, she had entered a rehabilitation program and never missed a visit, and she had begun costly divorce proceedings against the man who had physically abused her child. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255-1256.)

g. Did the parent file a timely appeal?

i. In juvenile dependency cases, an appeal must be filed within 60 days of the challenged judgment or order. (Cal. Rules of Court, rule 39(b).)

ii. An appeal from the most recent order entered in a dependency matter may not challenge prior orders, for which the statutory time for filing

an appeal has passed. (*In re Megan B.* (1991) 235 Cal.App.3d 942, 950.)

10. Special issues related to incarcerated parents.

    a. Penal Code section 2625 mandates the superior court to provide notice of any section 300 or 366.26 hearing be transmitted to the incarcerated parent. (Pen. Code, § 2625, subd. (b).) If the prisoner or his attorney requests his presence at the court proceeding, the court shall issue an order for the temporary removal of the prisoner from the institution. (Pen. Code, § 2625, subd. (d).)

    b. A child comes within dependency jurisdiction if the parent has been incarcerated and cannot arrange for care of the child. (Welf. & Inst. Code, § 300, subd. (g).)

        i. Failure to arrange for child's placement before the child's removal by Department is not sufficient in and of itself to meet the terms of section 300, subdivision (g). The statute requires proof that the incarcerated parent was unable to arrange for care at the time of the hearing, not that he had failed to do so at some prior point in time. (*In re Aaron S.* (1991) 228 Cal.App.3d 202, 209.)

    c. Penal Code section 361.5, subdivision (e)(1) requires the Department to provide reasonable reunification services to incarcerated parent unless the court determines, by clear and convincing evidence, that those services would be detrimental to the child. Services are limited to 12 months.

        i. Check to see whether prison visits were denied, especially where the incarcerated parent is in close proximity to child. (*In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1407, fn. 8 [visitation reunification services were inadequate when the Department failed to facilitate visitation with a mother who was incarcerated less than 40 miles from her daughter].) However, detriment cannot be based on child's distance from the prison alone. (*In re Jonathan M.* (1997) 53

Cal.App.4th 1234.)

ii. Welfare and Institutions Code section 361.5 requires a good faith effort to provide reasonable services responding to the unique needs of each family. (*In re Monica C.* (1995) 31 Cal.App.4th 296, 306.)

iii. Check to see whether services were reasonable. (*In re Monica C.* (1995) 31 Cal.App.4th 296 [services unreasonable where the Department failed to plan for continuing series of visitation, delegated responsibility to incarcerated mother to send her caseworker a list of available services, and refused to consider prospective guardian nominated by mother].)

iv. However, parent cannot simply argue that he "fully complied" with the requirements of his reunification plan, "to the extent permitted by his circumstances," and that there is no evidence he will be an unfit parent when he is released from prison. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 818.)

d. Appellate counsel should always take special care when communicating with a parent who is incarcerated to ensure the parent's confidentiality, particularly when the case involves sensitive issues, such as sexual abuse allegations against the parent.