Doctoring Dependency Defaults

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I. Unauthorized and Late Notices of Intent and Notices of Appeal

Untimely Notices of Intent. The appellate court may relieve a petitioner from default in the filing of the notice of intent to file a petition for extraordinary relief pursuant to rule 39.1B. However, the situations in which relief will be granted are by no means clear. (*Karl B. v. Superior Court* (1995) 34 Cal.App.4th 1397.) In most courts, an untimely or defective notice of intent is forwarded by the county clerk to the appellate court, sometimes stamped "received but not filed." The party must act expeditiously in the appellate court if any relief is to be obtained.

Late Notices of Appeal from Parental Rights Terminations.

The prospects for having a late notice of appeal excused are perhaps even bleaker than in the situation of a late notice of intent. For example, the doctrine of constructive filing, which assists appellants in criminal cases by deeming the prisoner's handing of the notice of appeal to a correctional official to constitute the filing of the notice, has ben held not to apply in civil cases. (*In re Ricky H.* (1992) 10 Cal.App.4th 552.) The published decisions have generally denied relief from late filing, citing the policy of obtaining final resolution of child custody matters. (*In re Isaac J.* (1992) 4 Cal.App.4th 525, 532.)

The one *published* case that assumes there may a potential for relief from default, did so in response to an allegation of extrinsic fraud. (*David H. v. Superior Court* (1995) 33 Cal.App.4th 368, 381-382.) It should be noted, however, that *David H.* did not grant relief, and did not expressly rule on the jurisdiction of the court to grant relief in that situation. Perhaps the equitable power of the court to set aside judgments obtained by extrinsic fraud may exist notwithstanding Welfare and Institutions Code section 366.26, subdivision (i), which states there is no power of the court to modify or set aside a final order.

One of the parents files timely notice.

The unpublished decisions give a glimmer of hope here. For example, in a case in which one parent's notice of appeal was timely but the other's was not, appellate courts have sometimes given relief. In such situations, the timeliness problem would not be so compelling because the other appeal was still pending. There is also the policy of "not doing justice in halves." (See, also, Cal. Rules of Ct., rule 1463(a); *In re DeJohn B.* (2000) 84 Cal.App.4th 100; but see, *In re Caitlin B.* (2000) 78 Cal.App.4th 1190.)

Misrepresentations by court or petitioner.

Another situation that strongly supports the granting of relief notwithstanding the existing case law (see, e.g., *In re Alyssa H.* (1994) 22 Cal.App.4th 1249), is where the opposing party or the court misadvised the party of the time limit for filing a notice of appeal, such as by telling the

party that the deadline was 60 days from entry of a written order rather than from the pronouncement in open court. Arguably

, the other side would be estopped from complaining of the untimeliness of the notice in such a case.

Ineffective assistance of counsel.

Also, some language from the cases, supports an argument that perhaps constructive filing or other grounds for relief may exist when the notice of appeal was filed late due to ineffective assistance of counsel. (*In re Isaac J.*, *supra*, 4 Cal.App.4th at pp. 531-532.)

Timeliness of Notices of Appeal from Other Dependency Orders.

Several other situations are worthy of special consideration. First, when the order must be in written form, the 60-day notice of appeal period does not begin to run until the written order is filed. For example, Welfare and Institutions Code section 362.4 requires that certain "exit orders" be filed in the family court, and this requirement has been held to require the filing of that order before the time period on the notice of appeal begins. (*In re Markaus V.* (1989) 211 Cal.App.3d 1331, 1337; In re *Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254.)

Some appellate attorneys have also argued that the 60-days period does not begin to run until the written order is signed by the judge in any case in which a written order is required by the rules of court. (See, e.g., rule 1463, incorporating Judicial Council Forms Manual on orders made pursuant to Welf. & Inst. Code, sec. 366.26.) It is noted however, that in calendaring dates for filing notice of appeal, one should use the procedure that does not raise a possibility of default. If there is truly a doubt as to when the order is operative and appealable, and one notice will not be timely as to both the oral pronouncement and the written order, then two notices should be filed, out of an abundance of caution.

Under rule 3(e) when a party files notice of appeal of an appealable order, the opposing party's time to file a cross-appeal of the order is extended to 20 days from the date the clerk mails notice of filing the first notice of appeal. This part of rule 3 has been held to apply to dependency appeals in at least one unpublished decision.

Also, it can be argued that the reluctance of the courts to apply the doctrine of constructive filing in appeals from orders terminating parental rights should govern other dependency appeals because the policy noted in *Alyssa H.* supporting finality of adoption is the sole reason not to apply the doctrine of constructive filing and there in no such policy where parental rights have not been terminated.

Placements by Social Workers. The notice of appeal is also not triggered by the removal of a child from a caretaker's custody pursuant to the Department's exercise of its placement discretion. The time only begins to run once there has been a court order. (*In re Cynthia C.* (1997) 1479, 1488.)

Referee's Orders. Also, the notice of appeal time period does not begin to run until a referee's decision becomes final pursuant to rule 1417(c).

Unauthorized Notices of Appeals and Notices of Intent. Where a notice of appeal is shown to have been filed without the client's authority, the appeal is dismissed. (*In re Alma B.* (1994) 21 Cal.App.4th 1037, 1043.) However, the authority of counsel to file notice of appeal is otherwise presumed, and appeals will not be dismissed without a showing that counsel has acted without authority. (*In re Malcolm D.* (1996) 42 Cal.App.4th 904, 910.)

However, a notice of intent to file a petition for extraordinary relief pursuant to rule 39.1B requires the petitioner's signature, or the petitioner will have to establish good cause for relief from default. (Rule 39.1B(f); *Suzanne J. v. Superior Court* (1996) 46 Cal.App.4th 785.) The published case law has yet to establish what constitutes good cause, except that the requirement is excused when the client did not receive notice of the hearing from which writ relief is sought, and the client's failure to sign the notice of intent results from the lack of notice of the hearing. (*In re Stephen H.* (2001) 86 Cal.App.4th 1023.)

When the notice is signed by the attorney instead of the client, good cause must be established either by a declaration attached to the notice, or by a motion for relief from default filed in the appellate court as soon as possible after the good cause is known. Inability to locate the client is not, by itself, good cause. (*Janice J. v. Superior Court* (1995) 55 Cal.App.4th 690.)

In an unpublished case, the Third District failed to find good cause for relief from default and dismissed the rule 39.1B petition, when the declaration merely stated that the client lived in a county other than the county where the attorney had his law office. In that case there was no elaboration as to why the client could not communicate with the attorney, and the reasons were not supplemented by a subsequently filed declaration. The opinion of the Third District appears to have some support in the published cases. In *Lisa S. v. Superior Court* (1998) 62 Cal.App. 4th 604, the appellate court denied relief where the declaration stated that the client had authorized the notice of intent, but did not explain why she had not signed it.

Thus, out of an abundance of caution, the declaration for relief from default should establish: both 1) a reasonable communicative delay between client justifying the attorney in signing for the client; 2) the fact that the client has in fact received authorization to file a notice of intent. If these representations cannot be made in the initial declaration, then thought should be given to supplementing the declaration when it becomes possible to do so.

II. Rule 39.1 Writ Requirement

Discussion.

Welfare and Institutions Code section 395 has been interpreted to provide that all dependency orders affecting substantial rights of the parties may be appealed. Thus even a discovery order has been found appealable under section 395. However section 366.26, subdivision (l) and rule 39.1B(d) require that any order setting a permanency planning hearing pursuant to section 366.26 must be pursued by rule 39.1B. This provision has been interpreted to include virtually all orders made at the time of the setting hearing. (*In re Amber J.* (1992) 3 Cal.App.4th 871, 880.) If

the writ is not pursued, the issue may not be raised on appeal; if the writ is denied summarily, such issues may be raised on appeal from order terminating parental rights. (Sec. 366.26, subd. (l).

Jurisdictional and dispositional orders.

The general rule is that jurisdictional orders are not directly appealable, but the jurisdictional findings may be appealed from the subsequently issued dispositional order. (*In re Jennifer V.* (1988) 197 Cal.App.3d 1206, 1209.) However, when the dispositional order includes the setting of a permanency planning hearing, the rule 39.1B writ requirement is invoked. (*In re Anthony D.* (1997) 67 Cal.App.4th 149, 156; *In re Rebekah R.* (1994) 27 Cal.App.4th 1638.) In the past some attorneys have desired to challenge the *Anthony D.* ruling. Those who intend to do that should file both a writ and appeal to avoid the potential for default.

There is another point of view -- one that jurisdictional orders made pursuant to section 364 on a subsequent petition are immediately appealable. This theory derives from section 395, which authorizes appeals of all orders following first disposition in a dependency case that significantly affect a party's rights. (See, *In re Melvin A.* (2000) 82 Cal.App.4th 1243; *In re Daniel K.* (1998) 61 Cal.App.4th 661, 666-667.) Since, by definition, the jurisdictional findings on a subsequent petition follow the original disposition and the findings may affect significant rights of the parent, the argument is that the issue is immediately appealable. Not only that but it may be too late to appeal those findings later if the dispositional hearing on the subsequent petition is delayed. The reply to this position is that the jurisdictional order, although significant, is not final for purposes of appeal. For those who are concerned that the jurisdictional order may be immediately appealable, potential remedies include filing for extraordinary relief, or appealing both the jurisdictional and dispositional orders, and possibly consolidating the appeals if that does not cause too much delay.

Modification petitions.

Where, by the grant of a petition to modify under section 388, the result is the setting of a permanency planing hearing pursuant to section 366.26, the aggrieved party must file a rule 39.1B petition to challenge the rulings made at that hearing. (*In re Charmice G.* (1998) 66 Cal.App.4th 669; *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1023.)

Exceptions to the writ requirement.

There are several situations that, although seeming to require a petition for extraordinary hearing because of the denial of services, do not in fact trigger the writ requirement because a permanency planning hearing is not set. For example, if adoption or guardianship are clearly inappropriate and the minor is therefore "fast-tracked" into foster care under section 366.21, subdivision (g)(2) or section 366.22, subdivision (a), the permanency planning hearing is never set, and issues such as the termination of services may be appealed directly from the review hearing.

Similarly, if the court denies services to one parent, but orders services to the other parent, the

parent who is denied services may appeal the order because a permanency planning hearing has not been set. However, if the services the second parent are later terminated at a subsequent hearing, the permanency planning hearing will now be set, and the first parent should consider writ relief at that time, whether by filing a subsequent writ or by attempting to convert that parent's already pending appeal to a writ.

In the past it was said that issues collateral to the setting of the permanency planning hearing may be appealable. (See, e.g., *In re Eli F.* (1989) 212 Cal.App.3d 228, 235-236.) However, this view is currently in disfavor. (*In re Amber J.* (1992) 3 Cal.App.4th 871.) Therefore, when there is doubt as to whether an issue is truly collateral, the matter should be pursued by writ, in addition to any appeal.

III. Record on Appeal

Discussion.

Judgments and orders in both criminal and civil cases have been reversed on occasion based on due process grounds where the record is insufficient to determine for the appellate court to determine what happened in the trial court. (*People v. Apaletequi* (1978) 82 Cal.App.3d 970, 974; *In re Christina P.* (1985) 175 Cal.App.3d 115, 129.) However, the burden is on the appellant to demonstrate both that an error has occurred and that the appellant has been prejudiced by the error. This requires the appellant to make reasonable efforts to attempt the record to be reconstructed or settled as to what happened in the trial court as to the issue raised on appeal. (*People v. Osband* (1996) 13 Cal.4th 622, 661-663.) The appellate court will only reverse for failure to preserve a record only when it becomes clear that reconstruction or settlement of the record is impossible and that the items that cannot be restored are so significant that their absence from the record deprives the appellant of due process. (*People v. Coley* (1997) 52 Cal.App.4th 964, 972.) Typically, the remedy for lost exhibits is by motion to settle or reconstruct the record. (*Ibid.*) When the matter has not been reported or the transcripts are lost the remedy is to seek settlement of the record. (Cal. Rules of Ct., rule 7; *People v. Apaletequi, supra*.)

IV. Objections, Admissions and Submissions

Waiver Generally.

The doctrine of waiver may be invoked by the court to avoid reaching the merits of issues that are otherwise arguable on appeal. The waiver policy is based on a belief that parties should not be permitted to deliberately stand by and later claim trial court error. (*In re Riva M.* (1991) 235

Cal.App.3d 403.) However, specific objections are not necessary to preserve all appellate issues. Submissions of cases may have the effect of waiving some issues but not others.

Effect of admissions.

The most complete resolution of an issue between the parties in a dependency case is the admission or "no contest plea." As to the facts in a petition thus established, the truth is established for all purposes. The truth of these facts may not be contested at subsequent hearings. (*In re Troy Z.* (1992) 3 Cal.4th 1170.)

Admission by subsequent acquiescence.

Similarly, it has been held that admission of contested facts at a subsequent hearing, such as by signing a stipulation that "the facts leading to the original finding of jurisdiction continue to exist," may waive the party's appellate challenge to the sufficiency of evidence supporting the jurisdictional findings. (*In re Eric A.* (1999) 73 Cal.App.4th 1390.)

But a parent who does not admit the jurisdictional facts may stipulate to placement and visitation orders at the dispositional hearing without waiving jurisdictional challenges that were previously raised. The policy here is to favor negotiated resolution of placement issues pending resolution of the appeal. (*In re Jennifer V., supra*, 197 Cal.App.3d 1206, 1209-1210.)

Submissions vs. admissions.

A submission on the recommendation of the social worker is an agreement of the parties to that result. This submission waives any appellate challenge to the recommendation. (*In re Richard K.* (1995) On the other hand, a submission on the report is viewed as a trial on the reports. (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798.) As to matters upon which the social welfare department has the burden (detriment to return the child at the dispositional and subsequent review hearings or adoptability at the permanency planning hearing), the sufficiency of evidence supporting these findings can be challenged on appeal after a submission on the reports. The better practice however is for trial to include in the submission an express objection to the sufficiency of the evidence provided by the report.

Fact-specific challenges.

However, the parent must challenge in the juvenile court the sufficiency of the evidence supporting many other findings upon which the petitioner has the burden, especially those findings that require factual development. Typically, challenges should be made to the reasonableness of the service plan or the adequacy of services during the time period reviewed to preserve these issues for appellate review. (Cf., *In re Julie M.* (1999) 73 Cal.App.4th 9, 13 [failure to appeal adequacy of services at prior hearing; *L.A. County Department of Children and Family Services v. Superior Court* (1997) 60 Cal.App.4th 1088, 1092-1093 [same].) The usual result in the unpublished cases has been to find such challenges waived. But, the case law is not well-defined in this area, leaving open appellate challenges on the grounds that services were adequate as a matter of law, or the plan was completely lacking. (See, e.g., *In re John B.* (1984) 159 Cal.App.4th 268, 275.)

Effect of different burdens of proof.

The truth of some jurisdictional facts may be challenged subsequently because of the higher standard of review, clear and convincing evidence, required in support of orders removing children from the home of the parents at the dispositional hearing or keeping them removed from the parents in subsequent review hearings. (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1754.) So, a parent does not admit to the facts in a jurisdictional hearing, or subsequently, maintains the ability to challenge the allegations.

Objections Below on Wrong Ground or Different Grounds.

The appellate court will not reach an issue if the objection below did not call the attention of the court to the legal issue that is asserted on appeal.

A typical problem arises when the appellant wishes to raise a constitutional issue on appeal related to but not identical the legal issue raised in the trial court below. The courts have generally not permitted this. (*In re Gilberto M.* (1992) 6 Cal.4th 1194; but see, *In re Laura H.* (1992) 8 Cal.App.4th 1689.) So, generally, a hearsay objection will not be sufficient to raise a challenge under the constitutional basis that the use of witness's out-of-court statement violated the parent's due process right to confrontation.

This becomes a very complex problem when the hearsay objection is made to out-of-court statements of a child under 12 years of age who is the subject of the petition and whose statement is contained only in the social study. Under Welfare and Institutions Code section 355, the statement is admissible. However, the statement may not be the sole basis for jurisdiction except if under certain conditions of reliability, and the plurality of justices of the California Supreme Court in *In re Lucero L.* (2000) 22 Cal.4th 1227, have indicated that due process confrontation may require more than the requirements of section 355. However, the hearsay objection only triggers consideration by the courts of the reliability considerations contained within section 355. It does not necessarily raise the due process confrontational issues discussed by the plurality in *Lucero L.* In order to preserve a challenge to jurisdiction based upon the statements of a truth incompetent child, the objection must be more than hearsay. The objection should stress the confrontational and reliability concerns addressed by the plurality in *Lucero L.*

Remedying waiver problems.

Many appellate counsel will attempt to remedy the "incorrect objection at trial" problem by asserting that an exception applies when the issue raises a close question of waiver or a clear question of law. (Cf., *In re Jasmine C.* (1999) 70 Cal.App.4th 71, 78, fn. 3; *People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6.) Alternatively, appellate counsel has argued on appeal that choosing the wrong ground for objection constituted ineffective assistance of counsel. The latter ground may be feasible where there is no reasonable tactical reason for not having made the correct objection in the trial court. (See, *In re Eileen A.* (2000) 84 Cal.App.4th 1248.)

V. Due Process Violations and Ineffective Assistance of Counsel

Raising ineffective assistance of counsel.

Typically, a request by a parent to modify the case plan to return the child to the parent is not properly before the court at a permanency planning hearing, unless it is set to be heard before or concurrently as a properly noticed hearing on a petition to modify pursuant to Welfare and Institutions Code section 388. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 304-306.) So, the failure of a parent's counsel to pursue a section 388 petition having a reasonable probability of success prior to the permanency planning hearing may constitute ineffective assistance of counsel. (*In re Eileen A., supra*, 84 Cal.App.4th 1248, 1260-1261.) Where the absence of a tactical reason for failing to file the petition appears on the record, the issue may be pursued on direct appeal. (Id., at pp. 1254-1255, citing *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Also, where the record forecloses the possibility of a tactical reason for counsel's inaction, the issue may be pursued by petition for writ of habeas corpus while the appellate court has jurisdiction. (*In re Carrie W.* (2000) 190 Cal.App.4th 530.)

Due Process notice of permanency planning hearings.

While some authorities state that a showing of prejudice is required no matter how serious the violation of due process, such a requirement is rarely applied when the parent does not appear at the first hearing date set for the hearing of a permanency planning and parental rights are terminated. (*In re DeJohn B.* (2000) 84 Cal.App.4th 100.) However, if the failure to give notice is a technical violation, and it does not appear that the parent's failure to appear resulted from the technical non-compliance, the party must demonstrate the prejudice of the error. (*In re Phillip F.* (2000) 78 Cal.App.4th 250.)

Due Process Violations at Prior Hearings.

In *In re Meranda P.* (1997) 56 Cal.App.4th 1143, the Fifth District declined to address claims made on appeal from an order terminating parental rights based on due process violations occurring at hearings conducted earlier in the proceedings. However, *Meranda P.* has been limited somewhat by subsequent decisions of the Fifth District and other districts. For example, in In re Janee J. (1999) 74 Cal.App.4th 198, Division Two of the First District held that due process errors made at the hearing immediately preceding the section 366.26, the hearing at which the section 366.26 was set, may be appealable from an order terminating parental rights if a serious due process violation clearly occurred at that earlier hearing. The Fifth District has followed *Janee J.* On this point in at least one unpublished decision. (See also, *In re Carrie W., supra*, 190 Cal.App.4th at pp. 534-535.)

Similarly, the Fifth District in *In re Cathina W.* (1998) 68 Cal.App.4th 716, 724, permitted the parent to raise on appeal from the permanency planning hearing issues from the hearing at which services were terminated because the clerk had failed to give timely notice of the rule 39.1B writ requirement, as required by rule 1463(b)(2)(A), and the parent defaulted on the writ. However, in *Cathina W.*, the Fifth District required a showing of prejudice.