

Mining the Dependency Appeal Record for Issues

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A. Introduction

These materials are intended to facilitate a discussion of an approach finding arguable issues in the dependency record on appeal. Immediately below, is a brief digest of the record on appeal for an actual dependency case, which will be used to demonstrate this approach to finding issues. (All case identifying information has been removed and the appellant's name has been changed.) A redacted version of the Appellant's Opening Brief is included at the end of the materials. However, in the interests of a spontaneous and untainted discussion of the potential issues presented in this record, participants are asked to refrain from reviewing the brief until after the presentation and discussion.

B. Mr. Smith's Appeal - A Sample Case for Discussion Purposes

Your appellant, Mr. Smith, is appealing the January 2002, termination of his parental rights to his three children, an eight-year-old and two six-year-olds.

The dependency case began in 1997, when the children, then three and two years old respectively, were removed on allegations of general neglect, domestic violence, and parental drug abuse. The mother died prior to the jurisdiction hearing. The appellant father submitted the issue of jurisdiction on the petitions, and the jurisdictional allegations were found true. At the time of the dispositional hearing in May 1977, the appellant was incarcerated, a status which would exist off and on, but mostly on, throughout the dependency proceedings. The children were made dependents of the court and removed for out-of-home placement in the home of a relative. A reunification plan was adopted.

At the six-month review hearing in January 1998, the appellant was serving a prison term. Due to the appellant's incarceration, the Department claimed visits with the children had not been possible, and that the appellant had failed to make any progress toward reunification. The Department recommended termination of reunification services, and the setting of a Welfare and Institutions Code section 366.26 hearing. These recommendations were adopted by the juvenile court.

At the section 366.26 hearing in October 1998, the Department recommended a plan of long-term-foster care as the children were believed not to be adoptable due to emotional and developmental delays. There were also serious concerns regarding the relative caretaker's ability to provide a home for the children. The juvenile court adopted the Department's recommendation.

In April 1999, the children were removed from the home of the relative caretaker and placed in

non-relative foster care. This change of placement was subsequently ratified by the juvenile court hearing the Department's section 387 petition to ratify the change of placement. The appellant was out of prison for a short time following that hearing, but was returned to prison on a parole violation shortly thereafter.

At a review hearing in February 2000, the case was set for a second section 366.26 hearing. The report for the section 366.26 hearing opined that the children were adoptable and recommended that the appellant's parental rights be terminated. After a contested hearing in July 2000, the juvenile court determined that it was likely the children would be adopted, but that they would be difficult to place as a sibling set. The court identified adoption as the permanent plan goal and continued the matter for 90 days to find an adoptive placement. The court denied the appellant's request for visitation with the children and ordered that there be no contact. This judgment was the subject of the appellant's first appeal, which remained pending at the time of the termination of parental rights hearing.

The case continued in this posture for some 10 months. At a review hearing in May 2001, the Department claimed the appellant, who had again been released on parole, had sabotaged a promising prospective adoptive placement with the children's great aunt and uncle through intimidation and through unauthorized contact with the children. The aunt and uncle had cared for the children for some six months and had developed a close and loving relationship with the children. After the appellant re-entered the picture, the aunt and uncle decided against adoption, but they told the social worker they were willing to continue to care for the children. Because an adoptive placement had not materialized for the children, the juvenile court changed the permanent plan from adoption back to long-term foster care. Although the appellant renewed his request for visitation with the children, the juvenile court again refused. This latter order was the subject of a second appeal by the appellant, which also remained unresolved at the time of the termination of parental rights hearing.

Three months later, the Department filed a section 388 petition to modify the permanency plan to authorize out-of-county placement of the children, and to set a section 366.26 hearing. In support of the petition, the social worker averred only that a state adoptions worker had found a prospective adoptive family that resided outside the county.

The appellant was not present at the hearing on the 388 petition. Though he disclaimed knowledge of the appellant's whereabouts, the appellant's counsel objected to the notice provided to the appellant because he believed that if the appellant had been properly noticed, he would have been in attendance at the hearing. Counsel also asked for a contested hearing on the section 388 petition, particularly on the Department's removal of the children from their placement with their great aunt and uncle to an out-of-county placement. The Department's counsel stated the appellant was in prison, and that the notice of the section 388 petition which was served on the appellant by the Department had been returned undelivered. The request for a contested hearing was denied, the juvenile court concluding that because the great aunt and uncle were licensed foster parents and the children were being moved from one foster care placement

to another, the removal of the children and placement in an out-of-county placement was not a movement of the children to a higher level of placement. The juvenile court granted the Department's petition and set the matter for a section 366.26 hearing.

After the 388 hearing, the clerk mailed a copy of a rule 39.1B notice of intent form to the appellant at the appellant's last known address. Neither a notice of intent, nor a rule 39.1B extraordinary writ petition were filed. And the appellant did not file a section 388 modification petition between the setting and the section 366.26 hearing. However, notice of the section 366.26 hearing was served on the appellant in prison.

The Department's section 366.26 report related that the children had been in eight placements since the dependency proceedings commenced. In the most recent change of placement, the oldest child and the two youngest children were placed separately. The children had been in their new placements for less than a month. Both of the new caretakers wanted to adopt. The attitudes of the children toward the new placements and adoption was not known. However, the report repeated a statement which had been included in the adoption assessment prepared 10 months earlier to the effect that the oldest child had once said she wanted a family of her own. The report indicated the children were healthy and active. The children were said to be somewhat delayed in the area of social skills and academics, but making consistent progress. The social worker and the state adoptions worker both concluded the children were adoptable.

The appellant was out of custody in time for the section 366.26 hearing. The appellant appeared and testified that he believed the children had a connection to him and would benefit by a continuation of that connection, and through him, their connection with their extended family. He said he loved his children more than anyone else could. There was no evidence offered to challenge the social and adoptions workers' opinions that the children were adoptable.

At the conclusion of the hearing, the juvenile court adopted a permanent plan of adoption and terminated Mr. Smith's parental rights. A final appeal was filed from this hearing.

C. An Approach for Developing Issues in Dependency Cases

1. Read the record with these considerations in mind:

- Were the I's Dotted and the T's Crossed in the Proceedings Which Immediately Preceded the Order or Judgment?
- Was the Present Judgment Yesterday's News?
- Did the Appellant Fight with One Hand Tied Behind His or Her Back?
- Is the Grass Greener on the Other Side of the Fence?

- Don't Check Your Attitude at the Door
- But, Don't Lose Your Head

D. Analysis

1. Were the I's Dotted and the T's Crossed in the Proceedings Which Immediately Preceded the Order or Judgment?

- a. Consider the statutory requirements dependency law with respect to the specific proceeding or judgment under appeal, and whether those requirements were satisfied?
- Understanding the specific requirements of the dependency law is critical.
- b. Consider the requirements of due process with respect to the specific proceeding or judgment under appeal, and whether those requirements were satisfied?
- The right to due process in dependency proceedings is clear. (*In re B.G.* (1974) 11 Cal.3d 679.)
- The requirements of due process are determined by a balancing process. (*In re Malinda S.* (1990) 51 Cal.3d 368, 382-383.)
- c. And, where applicable, consider whether the requirements of the I.C.W.A were satisfied?
- d. In Mr. Smith's case were the specific requirements of due process and the statute observed in the proceedings immediately preceded the termination of parental rights?
- The requirements of due process and the Code.
- Is it arguable any of these requirements were not satisfied?

2. Was the Present Judgment Yesterday's News?

- a. Consider the particular judgment or order appealed in larger context of the ongoing dependency proceedings. Are there any issues running through the proceedings which can be exploited for issues in the present appeal?
- The dependency case is a dynamic process in which issues oftentimes emerge from, or as a consequence of, actions or omissions at an earlier stage of

the process.

- Issues present at earlier stages in the process also may reappear with a slightly different presentation.
- A dependency case is a story with an ongoing theme or themes. Issues which tap into an ongoing theme may resinate in a way that makes prejudice more arguable.

b. In Mr. Smith's case, were there any issues which arose in earlier proceedings which arguably impacted the proceedings currently being appealed?

3. Did the Appellant Fight with One Hand Tied Behind His or Her Back?

a. Consider whether the appellant was operating under or impacted by a special status or disability in the proceedings and whether appropriate accommodations were made with respect to that status or disability?

- Examples: incompetency, imprisonment.

b. Was Mr. Smith's case affected by a special status or disability?

4. Is the Grass Greener on the Other Side of the Fence?

a. Consider impact of orders or judgments made in proceedings leading up to the judgment or order under appeal, and whether, to the extent those orders or judgments were arguably incorrect or inappropriate, those issues may now be addressed in the present appeal?

- At the termination stage, consider *In re Cathina W.* (1998) 68 Cal.App.4th 716; *In re Rashad B.* (1999) 76 Cal.App.4th 442.

- Be mindful of *In re Meranda P.* (1997) 56 Cal.App.4th 1143, but consider whether the waiver doctrine must give way to due process. (*In re Jessica G.* (2002) 93 Cal. App. 4th 1180.)

b. Were there issues in Mr. Smith's case which might have been raised in a challenge to an earlier judgment or order which are vulnerable to challenge in his appeal from the termination of his parental rights?

5. Do you Need to Check Your Attitude at the Door?

a. Consider what it is about the case that evokes a sense of righteous indignation

or outrage, whether the problem can be raised and addressed in the appeal, and whether there is a way of channeling that outrage in a legal argument?

- Reverse engineering issues - i.e. start with the outrage and look for a issue which can serve as a vehicle to address the problem in the appeal.

b. Is there anything in Mr. Smith's case which evokes a sense of righteous indignation?

6. But, Don't Lose Your Head

a. Consider whether issues which may be suggested by these considerations may be waived for purposes of appeal and, if so, whether there is an arguable means of dealing with the waiver problem?

b. Are there any waiver concerns in Mr. Smith's case that need to be addressed?