WRIT PRACTICE IN DEPENDENCY CASES

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I. TRADITIONAL EXTRAORDINARY WRITS (PROHIBITION/MANDATE)

A. Availability of Traditional Writ Relief in Dependency Cases

1. General rule is that a writ will not lie where there is an appellate remedy.

   a. Writ relief is available to restrain a court or administrative agency from acting beyond its jurisdiction (prohibition). (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280.)

   b. Relief is available to compel a court or agency to do what is required (mandate). (*Thurmond v. Superior Court* (1967) 66 Cal.2d 836.)

   c. Writ relief is not available for the great majority of garden-variety legal errors. (*State Farm Mut. Aut. Ins. Co. v. Superior Court* (1956) 47 Cal.2d 428.)

2. Exceptions to the general rule may apply to child custody cases.

   a. The concept of irreparable harm through passage of time has been recognized in dependency cases. (*In re Emily L.* (1989) 212 Cal.App.3d 734.)

   b. Many published opinions suggest the seeking of writ relief as it is more effective than the appellate remedy. (*In re Michelle M.* (1992) 8 Cal.App.4th 326.)

   c. Examples:

      i. *L.A. County Dept. of Children Etc. Services v. Superior Court* (1996) 51 Cal.App.4th 1257 [question of propriety of appointing independent counsel for minors].

      ii. *Richard A. v. Superior Court* (2001) 87 Cal.App.4th 729 [denial of consideration of relative placement].

3. Use of writs in conjunction with an appeal.

a. If an order may be the subject of both writ and appellate relief, it is best to seek both in the event the petition for extraordinary relief is denied summarily.

b. However, do not consolidate the appeal and the writ because that may slow down the writ process. (*In re Kristin W.* (1990) 222 Cal.App.3d 234.)

B. Some Limitations May Apply to the Seeking of Traditional Writ Relief

1. The rule that an appeal provides an adequate legal remedy is sometimes applied even in the dependency context. (*Laurie S. v. Superior Court* (1994) 26 Cal.4th 195 [evidentiary ruling in a jurisdictional hearing is traditionally heard on appeal from the dispositional order].)

2. But some jurisdictional orders may be reviewed prior to disposition upon a showing that irreparable harm will result if a writ is not granted. (*Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238 [irreparable harm likely in failure to conduct jurisdictional hearing in day-to-day sessions].)

3. Traditional writ relief should not be sought in situations covered by rule 39.1B.

C. Responsibility for Filing Petition

1. Some decisions state that the trial attorney should be the one to pursue writ relief. (*Rayna R. v. Superior Court* (1993) 20 Cal.App.4th 1398.)

2. The appellate attorney may also seek the relief.

a. In the Third District, the appellate attorney may seek to expand the appellate appointment to pursue a writ.

b. In all districts, the reviewing court may deem the appeal to be a writ in the appropriate circumstances.

c. As a practical matter, valuable time may be lost while the record is being prepared, so appellate counsel should be notified by the trial attorney of the possible need for a writ.

D. Time for Filing Petition

1. The rule is 60 days – by analogy to the rules governing notice of appeal. (*Popelka, Allard, McGowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496 [but the reviewing court has discretion to hear a petition filed on a later date].)

2. The time period is extended by the time for finality of referee orders. (Cal. Rules of Court, rule 1417(c).)

E. Contents of Petition

1. General requirements for a petition:

a. The beneficial interest of the party in the action;

b. That the action is judicial in nature;

c. That the act is beyond the court's jurisdiction and is an abuse of discretion;

d. If an act is threatened, the fact that the act has not yet occurred.

(Source: *California Civil Writ Practice* (Cal CEB 1996), chap. 6.)

2. Many attorneys seek relief in the alternative [mandate/prohition] to "cover bases."

3. The petition must be verified.

a. Signing on "information and belief" may not be enough to obtain injunctive relief. (*Perlman v. Municipal Court* (1979) 99 Cal.App.3d 568.)

b. This problem may be less serious when there is a complete transcript available.

4. The covers and tables must comply with the Rules of Court on appeals and writs.

a. Appellate format is set forth in the appellate rules. (Cal. Rules of Court, rule 15.)

b. There is a specific rule of format for each type of writ. (Cal. Rules of Court, rule 56 [non-39.1B extraordinary writs].)

F. Exhibits [Rule 56] Required

1. A copy of the order from which relief is sought;

2. Copies of the documents and exhibits offered in the juvenile court in support of and in opposition to the granting of the order;

3. Copies of all other documents submitted to the juvenile court necessary for a complete understanding of the case and ruling;

4. A transcript of the proceedings or a declaration by counsel explaining why the transcript is unavailable and summarizing the proceedings including arguments and ruling, or stating that the transcript has been ordered and when it will likely be available.

Source: California Rules of Court, rule 56(d)

G. Stay Requests

1. The stay is first sought in the juvenile court.

   a. A stay order issued by the juvenile court must state that suitable provision has been made for the child pending review of the matter by the appellate court. (Cal. Rules of Court, rule 1435(c).)

   b. Therefore, any assertion of irreparable harm to a party pending resolution should be verified or supported by affidavits in a stay request.

2. A stay pursued in the appellate court must appear prominently on the petition:

   a. The request for a stay must be noted on the cover and in the tables. (Cal. Rules of Court, rule 56(c).)

   b. The Third District requires the petitioner to note in *the upper right hand corner of the cover*: (1) the fact of the stay request; (2) the date of the hearing to be stayed; and (3) the page of the petition where the reasons for the stay are provided.

H. Other Filing Requirements – Parties Served

1. The respondent court and all real parties must be served.

2. The Third District requires *personal service* when an emergency stay is sought.

I. Subsequent Pleadings and Actions in the Reviewing Court

1. The respondent or real party may file points and authorities as a matter of right.

    a. This filing is due five days from when the petition is served and filed. (Cal. Rules of Court, rule 56(b).)

    b. The purpose is to show why an order to show cause should not issue.

2. The court may order an informal response in lieu of issuing an alternate writ.

    a. Typically, the respondent or real party has 10 days to respond informally. The parties are informed that the court is considering issuing a peremptory writ at the outset. (*Palma v. U. S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.)

    b. As this response may be the only document that the respondent or real party will file in the case, it needs to be thorough.

    c. The court must allow full briefing of issues, even when using *Palma* procedures. (*Kowis v. Howard* (1992) 3 Cal.4th 888.)

3. The traditional procedure is to issue an alternative writ or order to show cause.

    a. When an alternative writ or order to show cause issues, a verified return must be filed by the respondent or real party, showing why the relief sought should not be granted. A demurrer may be filed *with* the return. (Cal. Rules of Court, rule 56(f).)

    b. When an alternative writ or order to show cause issues, the matter becomes a cause in the appellate court and has further briefing and oral argument, like an appeal.

4. The reviewing court also has the option of denying the petition summarily.

    a. A summary denial of a petition is final immediately. (See discussion below.)

J. Disposition and Finality

1. When the petition is denied summarily, that order is final immediately and the deadline for filing a petition for review is 10 days from the date of the order. (Cal. Rules of Court, rules 24, 28(b).)

2. When an order to show cause or alternative writ has issued the time period is extended by 30 days, so the party has 40 days total to file a petition for review.

3. If the 40th day falls on a weekend or holiday, the time is extended to the next working day; but the 30 day period is not extended by weekend or holidays.

4. A remittitur will issue in cases in which an order to show cause or alternative writ issued but not in cases in which relief was summarily denied. (Cal. Rules of Court, rule 25.)

a. The court may extend or shorten the time for issuance of a remittitur upon a showing of good cause or by stipulation of the parties.

II. RULE 39.1B WRITS

A. Background

1. The rule 39.1B policy states that orders setting a hearing pursuant to Welfare and Institutions Code section 366.26 should be reviewed by extraordinary writ rather than appeal.

2. The policy expresses a preference for review on the merits in the writ proceeding.

3. If the court does not decide a timely filed petition on the merits, appellate review of the setting order will be permitted on appeal from the section 366.26 order.

B. Appeal vs. Writ Remedy

1. All orders "subsumed" within the decision to set the section 366.26 hearing are subject to the rule 39.1B writ requirement. (*In re T.M.* (1988) 206 Cal.App.3d 314.)

a. Therefore, an "adequate services" finding made at a hearing in which the section 366.26 hearing was set must be pursued by a rule 39.1B writ proceeding.(*In re Amber J.* (1992) 3 Cal.App.4th 871.)

b. Also, a determination by the court at the dispositional hearing *not* to offer services should be reviewed in rule 39.1B writ proceeding if the section 366.26 hearing is set. (*In re Rebecca H.* (1991) 227 Cal.App.3d 825.)

2. The order is appealable when the 366.26 hearing is not set.

a. For example, if the court terminates services to the parents but selects a long term plan of foster care instead of setting a hearing pursuant to section 366.26, the order is appealable. (*In re Ruth G.* (1991) 229 Cal.App.3d 475.)

b. Similarly, if services are granted to one parent, but the other parent is denied services, the section 366.26 is not set, and the order denying services may be appealed.

3. The rule 39.1B writ requirement does not apply to all interim orders.

a. If some orders are made at the section 366.26 hearing, but others are continued to be heard later, orders made affecting substantial rights must be appealed. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243.)

C. Excuse of Writ Requirement

1. When the petition is filed timely but the court does not resolve the contentions raised in the petition, the contentions may again be raised on appeal from the section 366.26 order. (*Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501.)

a. It is not enough that the decision purports to be "on the merits." There must be a formal written opinion after issuance of an order to show cause or an alternative writ.

2. A parent or minor who was not notified of the writ requirement may be given the opportunity to raise issues on appeal from the section 366.26 hearing. (*In re Cathina W.* (1998) 68 Cal.App.4th 716.)

D. Notice of Intent; Contents

1. The parties must be notified of the writ requirement:

a. The court must orally notify the parties who are present at the hearing. (Welf. & Inst. Code, sec. 366.26, subd. (1)(3)(A).)

b. Within 24 hours, the clerk must mail the parties written notice, with notice of intent and petition forms. The forms must also be made available to the parties in court. (Cal. Rules of Court, rules 1456 (f)18), 1460 (f)(7), 1461 (d)(9), 1462 (b)(10).)

c. Failure of the court to give proper notice may excuse a party's non-

compliance with the writ requirement.

2. Rule 39.1B(f) specifies the contents of a notice of intent.

a. The notice must specify all dates of the hearing so that the court reporters can be identified and contacted.

b. The notice of intent must be signed by the petitioner except when:

i. the petitioner is a child and the child's counsel signs the notice, or

ii. upon a showing of good cause supported by a declaration of counsel.

c. Note that a statement that the party has authorized the attorney to sign the petition does not by itself establish good cause. The court may require a more complete showing.

d. Failure to provide complete justification may result in a summary dismissal. (*Suzanne J. v. Superior Court* (1996) 46 Cal.App.4th 785.)

e. The Judicial Council form for notices of intent is JV-820. (See downloadable form at http://www.capcentral.org/panel/forms/notice_of_intent.pdf.)

E. When and Where Notice is Filed

1. The notice is filed with the clerk of the juvenile court.

a. The clerk then notifies the parties of record writ as defined in rule 1407.

b. The clerk then lodges the notice with the appellate court, and the appellate court assumes jurisdiction of the writ proceedings. (Cal. Rules of Court, rule 39.1B(f).)

2. The notice must be filed within 7-calendar days of the order.

a. The date of the order is the date that the court either orally or in writing states its decision, whichever is first.

b. The filing date is extended to 12-calendar days when the parties are notified solely by mail.

c. A referee's order is not final for 10 days from date of mailing, the time

that the order is subject to a petition for rehearing. The notice of intent time is extended during the time that the order is not final. A petition for rehearing may further extend the time. (Cal. Rules of Court, rule 1417 (c).)

d. In calculating deadlines for filing documents, the time for filing is extended on holidays or weekends to the next day the court is open, but there is not an extension occasioned by the finality of the referee's order falling on a weekend or holiday.

F. Late and Defective Notices; Remedies

1. The remedy is established by case law rather than by rule 39.1B. (*Karl S. v. Superior Court* (1995) 34 Cal.App.4th 1397.)

2. Counsel should state the reason for the default as early as possible, preferably in a declaration submitted with the notice of intent, and if not then, as soon as possible. (Cal. Rules of Court, rule 39.1B(f).)

3. An administrative dismissal is immediately final. The appellate court does not maintain jurisdiction to grant rehearing; so the declaration should precede the dismissal.

4. When the default is based on the client's not signing the notice, the declaration must provide a compelling reason justifying the attorney's signature in lieu of that of the petitioner. (*In re Suzanne J.* (1996) 46 Cal.App.4th 785.)

G. Filing of Record

1. Upon filing the notice of intent the clerk notifies the reporters to provide the record within 12 days.

2. The clerk mails the completed record by means as speedy as express mail. It includes:

a. all reports and minute orders in the juvenile court file;

b. reporter's transcripts of all hearing dates setting the section 366.26 hearing;

c. any additional evidence or documents considered by the court at that hearing.

Source: California Rules of Court, rule 39.1B(g)

H. Obtaining Additional Record

1. The rules provide for the use of rule 35(e) procedures and motions to augment.

2. The motion should be filed within 5 days of receiving the record.

3. The motion to augment is preferred because it is determinative;

4. Do not assume that a motion to augment or grant of motion to augment extends time to file the petition except where this is specified by local rule or order. (Cal. Rules of Court, rule 39.1B(g).)

5. Consider using overnight mail for record correction, and remember that rule 40(k) does not apply to these motions. The motion will not be deemed "filed" on the date of mailing.

6. Other record correction procedures include settlement of the record, motions for judicial notice, and motions to correct the record.

7. Keep in mind that even if the appellate court has granted an extension to file the petition, the due date may be set a very short time after the filing of the augmented record.

I. Filing of Petition for Extraordinary Relief

1. The petition is filed within 10 days after the filing of the record in the appellate court.

   a. Remember that Code of Civil Procedure section 1013 and rule 40(k), concerning date of mailing, do not apply. The petition must actually reach the appellate court by the due date. (Cal. Rules of Court, rule 39.1B(k).)

2. There is no provision for extensions of time on pleadings.

   a. The only provision in rule 39.1B authorizing an extension concerns a possible 15-day extension of time for motions to augment. (See Cal. Rules of Court, rule 39.1B(n).)

   b. Counsel should not assume that there will be an extension of time on the petition unless the order expressly provides for that.

   c. Consider filing the petition and then providing an errata sheet or amended petition to provide the new citations to the record when the augmented record is filed.

J. Contents of Petition

1. The petition may be filed on form J-825, approved by the Judicial Council, but use of the form is not mandatory. (Cal. Rules of Court, rule 39.1B(i); see downloadable form at http://www.capcentral.org/panel/forms/petition_extra_writ.pdf.)

2. Counsel should keep in mind that although the rules seem to permit informality in the petition format, the decisions have enforced the general basic minimum required of all briefs.

3. Due to the nature of the rule 39.1B writ procedure, some format rules applicable to appeals and extraordinary writs do not apply.

a. It is unnecessary to prepare the tables and covers required for briefs under rules 13 and 44.

b. It is unnecessary to prepare the tabbed exhibits required in extraordinary writs under rule 56.

4. Statements should be provided notwithstanding the rules stating that counsel need only relate the contested facts and not repeat matters already referred to in the record. (Cal. Rules of Court, rule 39.1B(j).)

a. Appellate courts have always required appellate writer to "marshal" the facts, requiring the petitioner to provide a full and fair recitation of the facts, or risk default. (*Cresse S. v. Superior Court* (1996) 50 Cal.App.4th 947.)

b. It is now acceptable to merge statements of case and facts because this provides the court with a cohesive "story." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519.)

c. The court attorneys have stated that the summary can be concise, leaving out the unimportant, as long as the facts are fairly summarized.

5. The rules are also misleading in requiring a memorandum of points and authorities without specifying that the rules of writing appellate arguments apply. (Cal. Rules of Court, rule 39.1B(f).)

a. The argument must state the standard of review, especially any challenge to the sufficiency of the evidence, and must follow that standard in applying the law to the facts. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014.)

b. Failure to do so may result in default, although some courts have relieved appellants of default in this context. (*In re Nahid A.* (1997) 53 Cal.App.4th 1051.)

c. Assignments of error should be separately stated and separately headed. (Cal. Rules of Court, rule 15(a).)

d. The points and authorities should establish that a miscarriage of justice has occurred, or if the error is reversible under another standard, why that standard governs. (Cal. Const., art. VI, § 13.)

K. Absence of Arguable Issues

1. Counsel is not required to file a notice of intent when, in counsel's professional opinion, there are no arguable issues. (*Sue E. v. Superior Court* (1997) 54 Cal.App.4th 399.)

2. The same rule applies when counsel, who has filed a notice of intent in good faith, but upon reviewing the record, studies the issues further, concludes that there are no arguable issues.

3. As there are no provisions in dependency cases for a full review of the record, it is likely the writ proceeding will be dismissed if counsel files a "no issues" letter. (*In re Sade C.* (1997) 13 Cal.4th 952.)

4. Counsel may consider "substituting" out to let the client proceed "in pro per," but keep in mind that the rules contemplate pursuit of the writ by an attorney, which may be problematic. (Cal. Rules of Court, rule 39.1B(h).)

L. Stay Requests

1. As rule 39.1B writs are scheduled so as to eliminate the need for stays of section 366.26 hearings, stays are only granted when issues of substantial complexity are raised or review by the court requires extraordinary analysis. (Cal. Rules of Court, rule 39.1B(q).)

2. The stay should appear prominently on the petition.

3. If the Judicial Council form JV-825 is used, the request should be placed in item 10. (See downloadable form at http://www.capcentral.org/panel/forms/petition_extra_writ.pdf.)

4. If the form is not used, the request for a stay should be prominently placed in the title and on the cover.

5. Some attorneys seek a continuance of the section 366.26 in the juvenile court before making the stay request, as that is the practice in traditional writ practice.

M. Response

1. The response is due 10 days after the petition is filed or after receiving an order directing a response, or after the petition was served by mail. (Cal. Rules of Court, rule 39.1B(m).)

2. The California Rules of Court do not specify format or contents of the response.

N. Oral Argument

1. The local procedures for demanding oral argument vary from court to court.

2. In the Third District Court of Appeal, counsel must demand argument within 7 days of the due date for the response.

3. In other appellate courts, the court may or may not send out an oral argument memoranda.

4. For these reasons, the best practice is to contact the appellate court clerk to determine the local procedure for demanding oral argument rather than awaiting an oral argument memoranda.

O. Notice of Decision

1. The court may use the Judicial Council form for purposes of this order.

a. Judicial Council Form JV-826.

2. When the juvenile court compels action or inaction within 7 days, or there is other urgency, the appellate court clerk must notify the juvenile court clerk, who notifies the judge. (Cal. Rules of Court, rule 39.1B(r).)

P. Finality of Decision

1. A decision issued without the issuance of an order to show cause is final immediately. The time for a petition for review in that case is 10 days from the date of opinion. (Cal. Rules of Court, rules 24(a), 28(b).)

2. A formal written opinion is normally final after 30 days, which makes the petition for review time 40 days from the date of opinion, but the court may provide for earlier finality. (Cal. Rules of Court, rule 34(d).)

3. When in doubt as to which of the two deadlines apply, assume a 10-day deadline.

III. WRIT OF HABEAS CORPUS

A. Uses and Limitations on Use of Habeas Corpus Relief in Dependency Cases

1. The petition for writ of habeas corpus is used like in criminal cases – to bring matters before the court that are not part of the appellate record; illegal custody is alleged. (*In re Alexander S.* (1987) 44 Cal.3d 857.)

a. The writ is used to correct late notices of intent or late notices of appeal. (*Katheryn S. v. Superior Court* (2000) 82 Cal.App.4th 958.)

b. The writ is also used to prove ineffective assistance of trial counsel and other due process violations that may not appear on the appellate record. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635; *In re Carrie W.* (2001) 90 Cal.App.4th 530.)

2. The case law has imposed limitations on the availability of collateral relief in dependency cases, especially after parental rights have been terminated.

a. The *Benoit* rule deeming the notice of appeal date satisfied by the inmate's delivering the notice to prison officials does not apply in dependency. (*In re A.M.* (1989) 216 Cal.App.3d 319.)

b. The published authorities deny relief for late filing of a notice of appeal from orders terminating parental rights. (*In re Isaac J.* (1992) 4 Cal.App.4th 525.)

c. Other opinions not certified for publication occasionally award relief from default – for example, where one parent was timely and the other was late.

3. The courts appear to agree that a writ of habeas corpus is not a remedy after an order terminating parental rights is final on appeal or notice of appeal was not filed. (*In re Meranda P.* (1996) 56 Cal.App.4th 1143.)

4. However, as long as the appeal is still pending, there is jurisdiction for the writ of habeas corpus to issue, notwithstanding *Meranda P.* (*In re Carrie W.* (2001) 90 Cal.App.4th 530.)

5. Another limitation set forth in *Meranda P.* is that habeas corpus will not lie to correct errors for which the time to appeal has expired.

6. But it may be possible on writ or appeal to attack previous orders where there was a complete lack of due process and the error caused a foundational-type defect. (*In re Janee J.* (1999) 74 Cal.App.4th 198; *In re Cathina W.* (1998) 68 Cal.App.4th 716.)

B. Duty of Appellate Counsel to Investigate and Pursue Writ of Habeas Corpus

1. The California Supreme Court has stated that the court-appointed appellate counsel is not required to pursue "off-the-record" ineffective assistance of counsel claims. (*In re Clark* (1993) 5 Cal.4th 750.)

a. This is based on the belief that the client is able to pursue the petition in pro. per.

b. However, footnote 20 of the *Clark* opinion states that counsel has a duty to inform the client of the nature of potential claims that counsel has seen in the review of the case, and that counsel will not be pursuing them.

2. In a particular case, counsel may have greater responsibilities to investigate and present a claim depending on the strength of the claim, the client's actual ability to present it, and the scope of counsel's appointment.

a. In the Third and the Fifth District Court of Appeal, counsel's appellate appointment includes limited investigation, but the appointment should be expanded in the event there will be extensive investigation or assistance offered to the client in pursuing the writ.

b. In other districts, the appellate appointment includes potential court-authority to pursue writs, but the project should be consulted before proceeding.

c. In all districts, court appointed counsel should consult with the appellate project in the early stages of investigation so as to determine whether further investigation or a motion to expand is needed.

d. The question of moving to expand an appointment may also include the question of obtaining an investigator.

C. Investigation of Claim of Ineffective Assistance of Counsel

1. The right to effective assistance of counsel in a dependency proceeding has a basis in due process, statutes and the rules of court. (*In re Arturo A.* (1992) 8 Cal.App.4th 229; *In re Kristin H.* (1996) 46 Cal.App.4th 1635; Welf. & Inst. Code, sec. 317.5.)

2. A typical problem in establishing ineffective assistance of counsel is that the appellate court will assume counsel had a reasonable tactical reason. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264.)

a. Sometimes the appellate courts have found that no reasonable tactical basis could have existed for counsel's actions or inactions. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248.)

b. In all other cases, the absence of a tactical reason will have to be established through taking additional evidence in a writ proceeding.

3. In all cases, it will be necessary to contact trial counsel for a response.

a. When the petition for writ of habeas corpus is filed in the appellate court, seeking counsel's response is necessary so that it may be placed in a declaration. The rules provide for an informal response. (Cal. Rules of Court, rule 60.)

b. When the petition for writ of habeas corpus is filed in the trial court, having the declaration may be helpful to establishing the claim, but is not absolutely necessary under the rules. (*Durdines v. Superior Court* (1999) 76 Cal.App.4th 247.)

c. As practical matter, appellate counsel should contact trial counsel and find out what were counsel's reasons, even if a declaration is not needed, so as to determine whether the claim is of any merit.

d. In many cases, appellate attorneys will discuss the issue in a phone call. In rare cases, an investigator or other third party is present to keep the appellate attorney from becoming a witness in the case.

e. An unanswered phone call is usually pursued by a second phone call, then a letter. The letter often has results when sent by facsimile.

f. Counsel has an ethical duty to respond to such inquiries. Results are often obtained by enclosing the ethical rules and the ethics opinion by the State Bar.

i. State Bar rules 3-400, 3-700(A)(a), 3-700(D)(1);

ii. State Bar Ethics Opinion no. 1994-134.

D. Choice of Court

1. All three levels of the California courts have jurisdiction to hear a petition for writ of habeas corpus. (Cal. Const., art. VI, § 10.)

2. In some districts, including the Third District, the superior court is often the preferred court of first-resort in criminal and in typical dependency cases where parental rights have not been terminated, as the superior court has facilities for taking evidence.

3. In other districts, the appellate court may grant an order to show cause, returnable before the superior court, if it appears that there is an evidentiary issue. (*In re Hochberg* (1970) 2 Cal.3d 870.)

4. The appellate court is typically the court of choice to remedy a late or defective notice of appeal, as the trial court has lost jurisdiction.

5. Similarly, although this question does not appear finally resolved, it seems less controversial to attempt to have the appellate court resolve questions of ineffective assistance of counsel at the appellate level, as the trial court may have lost jurisdiction. (Welf. & Inst. Code, sec. 366.26, subd. (i); *In re Carrie W.* (2001) 190 Cal.App.4th 530.)

a. The argument to the contrary is that in hearing a petition for writ of habeas corpus, the trial court would not be modifying its previous order under section 366.26, but hearing a completely collateral proceeding. (*In re Baker* (1986) 206 Cal.App.3d 493.)

b. It may be necessary to make such an argument in the Third District when the court expands appellate counsel's appointment and directs the petition be filed in the trial court.

E. Contents of Petition

1. Proceedings on a petition for writ of habeas corpus are governed by the rules of criminal procedure set forth in statutes and the rules of court.

a. Penal Code sections 1473-1508

b. California rules of Court, rules 56, 56.5, 60.

c. Judicial Council Form MC-275. (See downloaded form at http://www.capcentral.org/panel/forms/mc-275.pdf.)

2. A partial checklist of contents is included in rule 56, governing petitions in appellate court. Also form MC-275 can be used as a checklist.

a. Petitions should include:

i. a description of who has custody of the minor;

ii. a description of the petitioner's interest;

iii. a showing of how the custody is illegal;

iv. a showing that a different result would occur if relief is granted including the minor's present situation (*In re Arturo A.* (1992) 8 Cal.App.4th 229);

v. the reason for any delay in filing the petition (*In re Robbins* (1998) 18 Cal.4th 770);

vi. a reason why the petition was not filed in a lower court (if applicable);

vii. a list of other courts in which the allegations have been raised previously; and,

viii. a description of why there is not an adequate remedy at law.

3. Verification is required, and should be done by the person having personal knowledge of the allegations, where "off the record" facts are to be proven. (*Perlman v. Municipal Court* (1979) 99 Cal.App.3d 568.)

F. Service of Petition

1. The petition must be served on the respondent and any real party at interest. (Cal. Rules of Court, rule 56(b).)

2. As the minors are under the "restraint of court orders," the District Attorney of the county where the minors reside should be served 24 hours before the petition is heard. (Pen. Code, sec. 1475.)

G. Further Pleadings and Procedures

1. The superior court either grants an order to show cause or denies the petition.

a. The ruling occurs within the standard time, 30 days.

b. There is no informal response in the superior court. (Cal. Rules of Court, rule 4.500.)

2. An informal response is authorized appellate courts.

a. The appellate court may order an informal response, and authorize a time period for reply. (Cal. Rules of Court, rule 60.)

b. However, the court may not grant final relief without first issuing an order to show cause. (*People v. Romero* (1994) 8 Cal.4th 270.)

3. When an order to show cause issues, the respondent or real party wishing to contest the issuance of the writ must file a return.

a. There must be specific rather than general denials.

b. However, the respondent or real party may simply allege that allegations including expert opinions or of ineffective assistance of counsel are "contested" if the party does not have personal knowledge. (*People v. Duvall* (1995) 9 Cal.4th 464.)

4. A reply document, a verified traverse, or denial is required. (Pen. Code, sec. 1484; Cal. Rules of Court, rule 4.551(e).)

5. An order to show cause is almost always ordered returnable before the superior court when there is a contested evidentiary issue. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635.)

H. Finality of Decision; Further Review

1. An order denying a petition for writ of habeas corpus is not appealable.

a. The remedy when the denial is by the superior court is to re-file the petition at the next level court. (*In re Catalano* (1981) 39 Cal.3d 1.)

b. The same is true when the denial is by a reviewing court, but the party may file a petition for review in lieu of a petition for writ of habeas corpus.

c. The responding party may appeal the grant of writ of habeas corpus by the superior court, or may petition for review when the writ was granted by an appellate court.

2. An order of a reviewing court issuing or denying a petition for writ of habeas corpus becomes final in the same manner as other appellate court decisions.

a. When the petition is denied without the issuance of an order to show cause the order is final immediately. If this is by the appellate court the petition must be filed within 10 days. (Cal. Rules of Court, rules 24(a), 28(b).)

b. But the denial of a petition without an order to show cause on the same day as a related appellate decision is final at the same time as the appeal. (Cal. Rules of Court, rule 24(a).)

c. If an order to show cause has issued, the petition for review is due within 40 days of the date of an opinion. (Cal. Rules of Court, rule 24(a).)

IV. OTHER REMEDIES

A. Petition for Writ of Error Coram Nobis

1. This remedy is taken in the trial court to correct an error of fact that was not recognized before the completion of the hearing.

2. The remedy is by Writ of Error Coram Vobis in the appellate court if an appeal has already been taken.

3. The writ requires a very comprehensive showing of the following:

a. the fact or facts not presented to the court would have prevented the court from rendering its decision;

b. the new fact is not related to the issues tried;

c. the facts were not know to the party and could not have been learned through exercise of due diligence. (*In re Derek W.* (1999) 73 Cal.App.4th 828.)

B. Motion to Vacate

1. This remedy has been used successfully. (*In re DeJohn B.* (2000) 84 Cal.App.4th 100.)

2. Consider its application after an order terminating parental rights has become final without a notice of appeal filed. Case law has hinted that the remedy is obtainable, if at all, only upon a showing of extrinsic fraud. (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010; *David A. v. Superior Court* (1995) 33 Cal.App.4th 368.)

C. Consider Use of a Welfare and Institutions Code section 388 petition?

1. This remedy has the advantage of being familiar to the juvenile court.

2. The petition must show that modification is in the child's best interest, but the

"changed circumstances" showing may be satisfied by "newly discovered evidence." (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872.)