S271265
(2d Dist. Ct. of Appeal No. B308440)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GUARDIANSHIP OF S.H.R.,

S.H.R.,

Petitioner and Appellant,

v.

JESUS RIVAS, et al.,

Real Parties in Interest.

Appeal from the Los Angeles County Superior Court
Honorable Scott J. Nord, Judge Pro Tempore
Case No. 19AVPB00310

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS

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APPLICATION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 8.520(f) of the Rules of Court, the California Academy of Appellate Lawyers respectfully requests permission to file the attached amicus curiae brief in support of Petitioner S.H.R.'s argument regarding appellate procedural issues related to the standard of review and appealability.

The California Academy of Appellate Lawyers is a non-profit elective organization of experienced appellate practitioners. Its goals include promoting and encouraging sound appellate procedures designed to ensure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. The Academy has participated as amicus curiae in many cases before this Court, including *Jameson v. Desta* (2018) 5 Cal.5th 594, *F.P. v. Monier* (2017) 3 Cal.5th 1099, *Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, *Conservatorship of McQueen* (2014) 59 Cal.4th 602, *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, and *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106.

The Academy seeks permission to file the accompanying brief in support of its goal of furthering the effective administration of appellate justice. Because the Academy believes the accompanying brief would assist the Court in its resolution of the appellate procedural issues this case presents, the Academy respectfully request this Court's permission to file it.

The Petitioner is represented by a member of the Academy. In addition, the attorneys appointed to argue positions adopted in the Court of Appeal's Opinion are affiliated with a firm that includes members of the Academy. No lawyers at the firms representing Petitioner or the positions adopted in the Court of Appeal's Opinion drafted this brief or participated in the Academy's decision to file it.

More broadly, no party, attorney for a party, or judicial member drafted this brief or participated in our decision to file it. Other than the Academy and its members, no person or entity, including any party or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

DATED: March 21, 2022.

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

By /s/ *Sean M. SeLegue*
SEAN M. SELEGUE

LAW OFFICES OF ROBERT S. GERSTEIN

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AMICUS CURIAE BRIEF

The Petitioner raises an issue of appellate procedure related to the standard of review: whether the Court of Appeal erred in applying a deferential standard to review of factual findings, even though the trial court used the wrong legal standard in making them. For the reasons discussed below, the Academy believes the Petitioner is correct that, if the trial court made those findings in reliance on an erroneous legal principle, then that legal error precludes such deferential review. The Academy, however, expresses no view on the other issues presented in this matter, including whether the trial court in fact relied on an incorrect legal standard in making its factual findings. *See* Part I, *infra.*

In addition, the Court should address in its opinion an issue of appealability. Because there is conflicting case law on whether a "special immigrant juvenile" ("SIJ") order is appealable, the Petitioner here filed both a writ petition and a notice of appeal. The Academy believes the Court should clarify that such orders are appealable to avoid a potential trap for the unwary in these proceedings, which by their nature involve vulnerable persons, and also to avoid burdening other parties (and the courts) by unnecessarily duplicative filings. *See* Part II, *infra.*

I.

THE COURT OF APPEAL ERRED IN APPLYING A DEFERENTIAL STANDARD OF REVIEW.

Petitioner challenges the Court of Appeal's ruling applying a deferential standard of review to the trial court's factual findings because, Petitioner asserts, the trial court made them through the filter of various incorrect legal rulings. Opening Brief on the Merits ("OB") 34–46. Specifically, Petitioner challenges the Court of Appeal's application of the following standard: where a party such as Petitioner bears the burden of proof and the trial court made findings against him, "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." Typed Op. 11 (internal quotation marks omitted).

Existing precedent holds that a different standard applies when a factual finding is made in the context of an incorrect legal analysis. In *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, this Court held that "an order based upon improper criteria or incorrect assumptions calls for reversal even though there may be substantial evidence to support the court's order." *Id.* at 436 (internal quotation marks omitted); *see also, e.g., Dyer v. Dep't of Motor Vehicles* (2008)163 Cal.App.4th 161, 174 ["[w]here the trial court decides the case by employing an incorrect legal analysis, *reversal is required* regardless of whether substantial evidence supports the judgment."") (emphasis added).

Dyer correctly recognized that, in a substantial evidence appeal, the appellate court does not act as a fact-finder but rather decides whether a reasonable fact-finder *could* have ruled against appellant. As the Opinion here acknowledges, "[t]he substantial evidence test . . . does not ask what proposed facts are more likely than not to be the true facts; rather, it is aimed at determining a legal issue: Whether there is substantial evidence to support factual findings." Typed Op. 13–14 (citation and internal quotation marks omitted); *see also Dyer*, *supra*, 163 Cal.App.4th at 174 (where trial court did not decide a factual issue due to an incorrect legal conclusion, it had failed to perform an "essential function" and conducting a substantial evidence review would be "impossible," requiring remand).

For instance, if Petitioner is correct that the trial court erred in relying on what Petitioner dubs the "poverty alone" rule (*see* OB 35–40), then the Court of Appeal could not properly apply a deferential standard to affirm the order's conclusion that the minor had not established neglect. To do so would be to deprive Petitioner of a fair factual hearing by a fact-finder applying the correct legal standard. And that would deny due process. *Fuentes v. Shevin* (1972) 407 U.S. 67, 80 ("Parties whose rights are to be affected are entitled to be heard . . . ."). That is because the Court of Appeal cannot act as a fact-finder if it determines the poverty alone rule does not apply here, and the trial court considered the facts through the prism of the

poverty alone rule (at least according to Petitioner, a point as to which the Academy expresses no view).[1]

II.

THE COURT SHOULD CLARIFY THAT SIJ ORDERS ARE APPEALABLE

This matter also provides the Court with an opportunity to clarify the paths to appellate review of orders under the SIJ statute. The Court of Appeal here correctly held that such an order is appealable because "'no issue is left for future consideration except the fact of compliance or noncompliance with the terms' of the order." Typed Op. 10 (quoting *Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 696). In addition, the Opinion rightly concluded that "review by writ petition may also be appropriate under the circumstances of a given case"—i.e., when "remedy

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[1] On a related point, Petitioner asserts that the Court of Appeal erred in failing to address whether the trial court erred in relying on a "poverty alone" rationale. The Court of Appeal stated that it did not reach that issue, because an appellate court "review[s] the court's order, . . . not its reasoning, and may affirm the order if it is correct on any theory of applicable law." Typed Op. 12 n.8 (citing *D'Amico v. Bd. of Med. Exam'rs* (1974) 11 Cal.3d 1, 18-19). As Petitioner points out, that principle applies only on de novo review (OB 33-34) and only when the ruling is "'itself correct in law.'" OB 35 (quoting *D'Amico*, *supra*, 11 Cal.3d at 19). The *D'Amico* principle, which allows consideration of alternative "theor[ies] of the law applicable to the case" (11 Cal.3d at 19), is not appropriately applied on deferential review when considering whether the trial court relied on incorrect reasoning or assumptions that require reversal per *Linder* and *Dyer*, *supra*.

by appeal is inadequate" (Typed Op. 10); that would most commonly be the case when relief is required urgently before an appeal can be resolved.

Here, the Petitioner filed both a notice of appeal and a writ petition because the procedural law is unclear. Petition for Review 17. Prior to the Court of Appeal's opinion here, various decisions had reviewed SIJ orders either by appeal or writ, generally without commenting on the appropriate means of review. *See* Typed Op. 9 (citing cases). However, one decision, *O.C. v. Superior Court* (2019) 44 Cal.App.5th 76, can be read to suggest that a writ petition, and not an appeal, is the appropriate means to seek review. There, the petitioner—who had been unsuccessful in the trial court—filed an appeal. Rather than adjudicating the appeal, the Court of Appeal decided that, "[t]o ensure [petitioner] obtains appellate review of the probate court's findings, we exercise our discretion to treat the appeal as a petition for writ of mandate." *Id.* at 82.

An express ruling from this Court on the procedural avenues for review would clarify this point, eliminate a potential trap for the unwary and avoid duplicative filings.

CONCLUSION

The Academy urges the Court to clarify the appellate procedure issues discussed above.

DATED: March 21, 2022.

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

By /s/ *Sean M. SeLegue*
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CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.204 AND 8.520

Pursuant to California Rules of Court 8.204, and 8.520(b), (c) & (h), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing Amicus Curiae Brief of California Academy of Appellate Lawyers contains 1,190 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

DATED: March 21, 2022.

By: /s/ *Sean M. SeLegue*
SEAN M. SELEGUE

PROOF OF SERVICE
Supreme Court No. S271265
(Court of Appeal No. B308440)
(Los Angeles County Super. Ct. No. 19AVPB00310)

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 10th Floor, San Francisco, California 94111-4024. On March 21, 2022, I served the foregoing document(s) described as AMICUS CURIAE BRIEF OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS on the interested parties in this action by sending a true copy addressed to each through TrueFiling, the electronic filing portal of the California Supreme Court, pursuant to Local Rules, which will send notification of such filing to the email addresses denoted on the case's Electronic Service List.

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As the below recipients are not able to be served electronically via TrueFiling, I caused the document to be enclosed in a sealed envelope addressed to the persons named at the addresses listed below and the envelopes were placed for collection and mailing, following our firm's ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on March 21, 2022.

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